88-1444

Supreme Court, U.S.
FILED
MAR 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

MICHAELA BERESTEANU GOLIN,

Petitioner,

v.

FMC CORPORATION and GEORGE E. MOEHRINGER.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MICHAELA BERESTEANU GOLIN
626 Dutch Neck Road
East Windsor, NJ 08520
Tel. Nr.: (609) 448-6592
Petitioner, pro se

55 pp

QUESTIONS PRESENTED

1. Did the District Court err in holding that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, pre-empts a cause of action in contract and tort against the employer for a retaliatory discharge motivated by resistance to sexual harassment?

2. Did the District Court err in failing to consider evidence that the employer treated the plaintiff less favorably than comparable employees outside her group, and in holding, after a full trial on the merits, that the plaintiff did not establish a *prima facie* case of employment discrimination under Title VII?

3. Did the denial of plaintiff's motion for recusal violate the Due Process Clause of the Fourteenth Amendment, where the record reveals the trial

judge's hostility toward the plaintiff and bias in favor of the defendants?

TABLE OF CONTENTS

Questions Presented i

Table of Contents iii

Table of Authorities v

Opinion Below 1

Jurisdiction 2

Constitutional Provisions and Statutes 2

Statement of the Case 3

Relevant Procedural History . . . 3

Statement of the Facts 7

A. Background 7

B. The Sexual Harassment . . . 14

C. Favorable Treatment of Male Employees and Acquiescent Female Employees 16

D. The Sexual Harassment Complaint 19

E. The Employer's Response . . 23

REASONS FOR GRANTING THE WRIT 26

I. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT

SHOULD BE SETTLED BY THIS COURT, AS TO WHETHER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 PRE-EMPTS A CAUSE OF ACTION IN CONTRACT AND TORT AGAINST THE EMPLOYER FOR AN AT-WILL EMPLOYEE'S DISCHARGE MOTIVATED BY RESISTANCE TO SEXUAL HARASSMENT 26

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AS TO THE PROPER STANDARD OF PROOF IN AN EMPLOYMENT DISCRIMINATION ACTION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 . 32

III. THE DECISION BELOW CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT AS TO A TRIAL JUDGE'S DUTY UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO RECUSE HIMSELF WHEN HE IS PERSONALLY BIASED AND PREJUDICED AGAINST ONE OF THE PARTIES 37

Conclusion 46

TABLE OF AUTHORITIES

Cases: Page

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 28

Ford v. Revlon, Inc., 153 Ariz. 38, 734 P.2d 580 (1987) 30

Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) 34, 35

Glezos v. Amalfi Ristorante Italiano, Inc., 651 F.Supp. 1271 (D Md. 1987) 29

Holien v. Sears, Roebuck and Co., 298 Or. 76, 689 P.2d 1292 (1984) 31

In Re Murchison, 349 U.S. 133 (1955) 38

Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123 (1951) 43

Knapp v. Kinsey, 232 F.2d 458 (CA6), certiorari denied, 352 U.S. 892 (1956) 39, 43

Lucas v. Brown & Root, Inc., 736 F.2d 1202 (CA8 1984) 28

McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) 34, 35

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 35

Cases: Page

Offutt v. United States,
348 U.S. 11 (1954) 42

Salazar v. Furr's, Inc.,
629 F.Supp. 1403 (D NM 1986) . . 29

Savage v. Holiday Inn Corp. Inc.,
603 F.Supp. 311 (D Nev. 1985) . . 29

Taylor v. Hayes, 418 U.S. 488
(1974) 39, 42

Teamsters v. United States,
431 U.S. 324 (1977) 34

U.S. Postal Service Board of Governors v.
Aikens, 460 U.S. 711 (1983) . . 34-37

Ungar v. Sarafite, 376 U.S. 575
(1964) 42

United Mine Workers of America v. Gibbs,
383 U.S. 715 (1966) 4, 27

Statutes, Rules and Regulations:

28 U.S.C. § 144 37

28 U.S.C. § 455 37

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1343 3

Due Process Clause of the Fourteenth
Amendment of the United States
Constitution . . . i, 2, 37, 38, 42

Page:

Fed.R.Civ.P. 41(b) 5, 33

New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. 2, 3, 5, 26, 27

Rule 1:8-4, Current New Jersey Court Rules 42

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. . . . . i, 2, 3, 5, 26-32

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

MICHAELA BERESTEANU GOLIN,

Petitioner,

v.

FMC CORPORATION and GEORGE E. MOEHRINGER.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

The petitioner, Michaela Beresteanu Golin, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on November 7, 1988.

OPINION BELOW

The Court of Appeals affirmed without opinion the judgment rendered by the District Court for the District of

New Jersey. The opinion of the District Court is reproduced in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on November 7, 1988. A timely petition for rehearing was denied on December 2, 1988, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

This action involves Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*; the New Jersey Law Against Discrimination, N.J.S.A. 10:5-12 *et seq.*; and the Due Process Clause of the Fourteenth Amendment of the United States Constitution, the pertinent text of which is set out in the appendix

to this petition.

STATEMENT OF THE CASE

Relevant Procedural History

This is an individual action alleging sexual harassment, retaliation, and various torts by a private employer and one of its supervisory employees. This action was brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., ("Title VII"); its state equivalent, the New Jersey Law Against Discrimination, N.J.S.A. 10:5-12 et seq., ("NJLAD"); assault, battery, malicious interference with employment, breach of contract and tortious discharge. (Appendix ["App."] 2a-3a).

The District Court had jurisdiction over the federal claims under Sec. 706 of Title VII, 42 U.S.C. § 2000e-5, and 28 U.S.C. § 1343. The doctrine of pendent jurisdiction was

invoked for the state claims, assault, battery, malicious interference with employment, breach of contract and wrongful discharge, arising out of essentially the same factual allegations. United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966).

On January 13, 1987, prior to the presentation of evidence in this case, the plaintiff moved for recusal under 28 U.S.C. §§ 144, 455(a) and 455(b)(1), alleging that the trial judge had a personal bias and prejudice against her and in favor of the defendants. The judge denied plaintiff's motion, and refused to disqualify himself from the case. (Transcript of Hearing on Plaintiff's Motion for Recusal, 1/16/87 and 1/30/87).

Opening statements to the jury were presented on January 30, 1987. On

February 10, 1987, the district judge on his own motion dismissed plaintiff's breach of contract and wrongful discharge claims against the corporate defendant on the ground that these claims are pre-empted by Title VII and its state equivalent. (Transcript of Hearing on Motions In Limine, 1/27/87, pp. 47-50; Trial Transcript, Volume 8, page 5 ["8T5"]; Appendix to this Petition ["App."], p. 8a).

At the end of plaintiff's presentation of evidence, the defendants moved for involuntary dismissal under Fed.R.Civ.P. 41(b), for failure to establish a prima facie claim of employment discrimination. (7T3). The defendants' motion was denied on February 10, 1987, (8T5), and the case proceeded to a full trial on the merits.

On February 18, 1987, the jury found for the individual defendant on the claims of assault, battery, and malicious interference with employment. (12T37).

On August 26, 1987, the District Court filed the Opinion containing its Findings of Fact and Conclusions of Law on plaintiff's sexual harassment and retaliation Title VII claims, (App. 1a-67a), and entered judgment for the defendants on all claims. (App. 68a-69a).

On January 13, 1988, the plaintiff filed a timely notice of appeal to the United States Court of Appeals for the Third Circuit, seeking review of the District Court's judgment in this case.

On November 7, 1988, the Court of Appeals summarily affirmed the judgment of the District Court. (App. 70a-71a). Plaintiff's timely petition for rehearing was denied on December 2, 1988.

(App. 72a-73a).

Statement of the Facts

A. Background

Petitioner, plaintiff below, received a PhD in theoretical nuclear physics from Rutgers University in 1975. Throughout her educational years, plaintiff was consistently at or near the top of her class. (District Court Opinion, Findings of Fact ["Findings"] #2, App. 12a).

Respondent FMC Corporation is a multinational business corporation (3T228) engaged, inter alia, in the manufacture of chemicals. (3T256, 3T259). At all times relevant to this lawsuit, from November 1979 until April 1981, plaintiff was employed by FMC at its Princeton, New Jersey, Research and Development Center as a Senior Programmer/Analyst. (Findings #1, App. 11a). Except for a period be-

tween July 1980 and October 1980 when she was temporarily transferred to another group, plaintiff was assigned to work in the Technical Computing Services group ("TCS"), under the direct supervision of defendant George E. Moehringer. (Findings #1, App. 12a). Moehringer holds a Master's degree in engineering and in business administration. (8T131, 8T138).

The TCS group was managed by Dr. John Erjavec. In addition to TCS, Erjavec managed three other groups: Automation and Instrumentation Services ("A&IS"), Process Analysis and Statistical Analysis. (Findings #3, App. 14a-15a). Erjavec was ultimately responsible for all the hiring and discipline decisions, while defendant Moehringer recommended and participated in the hiring, firing, training, promotion, and discipline of his subordinates. (Id.). From

1968 to 1979, Moehringer supervised approximately 20 employees at FMC. (Id.).

In late February 1980, Golin complained to Erjavec, in Moehringer's presence, about her supervisor's habit of "walking into her" and of standing close to her when discussing work assignments. (Findings #6, App. 17a). Subsequently, in late February or early March of 1980, Moehringer complained to Erjavec about the plaintiff's job performance. (Id.).

The plaintiff testified that in late April 1980, she had to give a presentation in Middleport, New York. She testified that Moehringer insisted that she leave Princeton the night before, with him and one other employee, and that she spend the night in a hotel provided by FMC. (Findings #7, App. 18a; 5T160-161). Golin further testified that Moehringer became very angry when she

decided to go to Middleport on the morning of the presentation rather than travel with him the night before. (Id.). Plaintiff asserts that subsequent to the Middleport incident conflicts with Moehringer became more frequent. (Id.).

In 1981, Golin tape recorded a conversation between herself and Carol C. Scutte, Moehringer's secretary, in which Scutte said that she remembered the Middleport incident and Moehringer's screams. (Plaintiff's Exhibit P-35). Scutte relocated in Florida and did not testify at the trial. The tape recorded conversation was held inadmissible. (3T263, 3T266, 3T280).

Approximately one month after the Middleport incident, in late May or early June 1980, Moehringer complained to Erjavec in writing about the plaintiff's performance, and requested Erjavec to

allow him "to exercise the perrogative [sic] [he had] as the supervisor of a new exempt employee and discharge her from FMC before the problems become more serious." (Findings #8, App. 19a-20a). Erjavec did not approve the recommendation to discharge. (Id.)

In late July 1980, Erjavec arranged for the plaintiff to be transferred temporarily to the A&IS group to work under the direction of David Hall and Mike Zadoff. (Findings #9, App. 20a). Golin worked in this group until October 1980, when she returned to her regular group, and was again under the direct supervision of Moehringer. (Id.).

For her work in the A&IS group, plaintiff received from Hall a performance evaluation of 3, which means "standard performance." (Final Pretrial Stipulation and Order, filed 5/31/84, Section

2, Stipulation of Facts ["Stipulations"] #2.3, #2.4, p. 2A).

About one month after Golin returned to the TCS group, in November 1980, Moehringer provided Erjavec with an 11-page poor performance review of her work. (Findings #10, App. 21a). Erjavec reviewed this performance evaluation with the plaintiff. She disputed most of the comments made by Moehringer, and claimed that he was highly biased against her. (Id.). Specifically, the plaintiff challenged Moehringer's views that she took two to three times longer than a competent programmer would take to complete her projects. (Id., App. 22a).

As a result of his own review, Hall's evaluation and the performance evaluation of Moehringer, Erjavec determined that the plaintiff should be rated a 2, (satisfactory, but requires improve-

ment - some objectives not met), and he recommended her for a 5.8% salary increase. (Findings #12, App. 24a). In the comments section of the performance review, Erjavec wrote: "[a]lthough [Golin] is an experienced scientific Fortran programmer, she had to learn the DEC PDP 11/70 system, the VAX 11/780 system and some new software packages such as DRS. *** Her two main strengths in her performance are her good interaction with users and her good program documentation. Her weaknesses appear to be software development effort taking two to three times that expected by her supervisor, George Moehringer, and software that runs more slowly than anticipated by her supervisor." (Id., App. 24a-25a).

Erjavec testified that he was hoping that the plaintiff's work would improve through counseling and coaching

by Moehringer. (Id., App. 25a). Erjavec advised Golin that she should report to Moehringer in his office to keep him informed of her work and for coaching. (Id., App. 25a-26a).

B. The Sexual Harassment

Golin alleges that, while under the supervision of Moehringer, she was subjected by him to unsolicited sexual advances and remarks. (Findings #19, App. 35a). The events complained of were: Moehringer walking into her each time he came to her office to discuss professional matters, (Id.); Moehringer walking into her and telling her she would be raped if she worked after hours, (Id.; 5T154); Moehringer frequently asking for rides home in the evening, (Id.; 5T155); Moehringer rubbing her face with her coat's lapel, (Id.); Moehringer telling plaintiff he would like to hug her (Id.,

App. 36a); Moehringer becoming angry because she refused to travel with him to Middleport, New York, in the evening before a presentation, (Id.); and Moehringer telling her that a subordinate must do everything to please her boss. (Id.).

Golin acknowledged at trial that she was reluctant to meet with Moehringer in his office to discuss her work because of Moehringer's repeated sexual advances. (Findings #12, App. 26a). Golin and other programmers requested Moehringer to hold group meetings. However, he denied their request. (Id.; 5T191, 2T134-135).

In February 1981, plaintiff attempted to attend a Macro/Fortran systems services training course. Moehringer denied his permision for Golin's attendance. (Findings #14, App. 24a-25a). In a

memorandum he wrote to Erjavec regarding his denial of authorization, Moehringer wrote "The cost of one week of training for Golin is larger that $2500. I don't think she is worth the investment. *** I don't think she will ever be a good programmer." (Defendant's Exhibit JD-27, in evidence at 2T50).

C. Favorable Treatment of Male Employees and Acquiescent Female Employees

Moehringer authorized one of his female subordinates, Gail Carol Wright, to attend the Macro course, as well as a variety of other training courses. (3T83). Wright testified that, during a birthday party held for her by her coworkers at FMC, Moehringer kissed her on the cheek, and that she was not offended by his kiss. (Findings #26, App. 46a). Wright also testified that she traveled with Moehringer on business

trips, that they spent a week in the same hotel, and that Moehringer stood closer than a normal person would when he spoke to her, but none of these facts concerned her. (Id., App. 47a). Moehringer thought that Wright was a satisfactory employee (9T53), even though she sometimes missed project deadlines. (3T78).

Jeanne Root, another female employee supervised by Moehringer, testified that Moehringer stood so close to her when discussing her work assignments that she felt uncomfortable. (Findings #26, App. 47a; 2T130-131). Root alleges that she never complained about this conduct, because Moehringer "was the boss". (2T132). Moehringer admittedly was satisfied with Root's performance and advanced her in grade to Senior Programmer/Analyst, (9T52), even though he never cared to estimate how long Root's proj-

ects should take, (3T117, 3T118-120), but simply told Root to "make it work". (3T121).

Hall's projects were delayed by a month, or two, or three, sometimes they were not completed, and were abandoned. (6T261). The same applies to Mike Zadoff's projects. (Id.). Despite these performance failures, in or about October 1980, Erjavec promoted Hall to the supervisory level. (6T278).

Golin worked very long hours at FMC, remaining at work sometimes until 10:00 p.m. and even until 1:00 a.m. (5T180). Disregarding this fact, Moehringer reprimanded Golin for not arriving at work promptly at 8:00 a.m. (Plaintiff's Exhibit P-20, in evidence at 5T197). Yet Moehringer admittedly understood and it seemed all right to him that Robert Kiessling, a male subordinate,

always began work one hour late, at 9:00 a.m. (8T94).

Moehringer alleges that the company had a very definite policy that the working hours for all employees at the Research Center were 8:00 a.m. to 4:30 p.m. (8T142). This testimony was contradicted by David Hall, who also reported to Erjavec at the Princeton Research Center. Hall testified that he had quite a bit of variability in the times he came in, and was never required to arrive at FMC at certain hours or leave at certain hours. (6T258).

D. The Sexual Harassment Complaint

On February 20, 1981, at a meeting between Golin and Erjavec regarding the denial of Golin's training request, (5T192), Erjavec told Golin that Moehringer was very unhappy about her performance. (Findings #15, App. 29a).

Erjavec believed that Golin was lacking in a couple of important areas which could have been improved if she interacted more with Moehringer and sought his advice, but because she didn't do this, Erjavec alleges that he felt that the situation was hopeless. (Id.). Erjavec suggested that Golin might look for another job, but, at the same time, he vigorously reassured Golin: "I told her that we were not planning on firing her." (6T152, 6T199).

At that time, Golin requested and was granted a two-week vacation to begin immediately. (Findings #15, App. 29a). The plaintiff was on vacation from February 23, 1981 until March 9, 1981. (Id., App. 30a). Plaintiff testified that during the week of February 23, she returned to FMC and spoke to Burton Friedman, Personnel Supervisor, regarding the



denial of her training request. (Id.). She testified without contradiction that she confided in Friedman her belief that Moehringer denied her request because she rejected his sexual advances. (Id.).

On March 9, 1981, when plaintiff returned from vacation, Moehringer reprimanded her for failing to adhere to the "regular" working hours. (Findings #18, App. 32a). He warned Golin that, as of March 11, her pay would be reduced for not reporting to work on time. (Id.).

Moehringer also reprimanded Golin for failing to report to his office as she had been directed. (Findings #18, App. 34a). Plaintiff told Moehringer that she was reluctant to go to his office because he made passes at her. (Id.).

The same day, plaintiff went to the Personnel Department, and reported to Ed Politi, Employment Supervisor, that

she was reluctant to go to Moehringer's office as requested because Moehringer had been making passes at her. (Id., App. 35a; Stipulations #2.12, p. 2B; 5T199).

Two days later, on March 11, 1981, the plaintiff received a two-page memorandum from Moehringer in which he informed her that she would be discharged. (Findings #20, App. 38a). In support of this decision, Moehringer alleged Golin's inability to complete assignments on time, the poor quality of her work and her lack of cooperation. (Id.).

On March 12, 1981, Golin met with Erjavec and with Maurice Duggan, Personnel Manager, and complained to them about Moehringer's alleged sexual overtures. (Findings #21, App. 38a). Golin also suggested that other female subordinates had experienced similar problems

with Moehringer. (Id.).

E. The Employer's Response

In response to plaintiff's sexual harassment complaint, Erjavec suggested to Golin that she must provide the names of other women, in order to prove Moehringer's alleged bias. (Findings #25, App. 43a-44a). In a tape recorded conversation between Golin and Erjavec which took place on March 19, 1981, Golin asked Erjavec about the possibility of transferring to another group. (Findings #28, App. 49a). Erjavec answered that a transfer was not out of the question, but that it would not be necessary if Moehringer was guilty of the conduct charged. (Id.). Erjavec added that, if Moehringer was not found guilty, then, on the basis of Moehringer's evaluation of Golin's work, Golin would be discharged, as he had recommended. (Id.)

One of Golin's coworkers, Barbara A. Dvorak, approached Erjavec, and suggested that she should be interviewed by the FMC investigators because she believed she had a similar experience with Moehringer. (Findings #22, App. 39a). At trial, Erjavec testified that Dvorak reported to him that "George [Moehringer] had made an advance to her which she brushed off, and subsequently, she felt that George was being difficult to live with, you know, criticizing her work and so on." (6T217). Erjavec allegedly told Dvorak that she had misinterpreted Moehringer's conduct, that sexual advances are subject to interpretation, and that these matters are in the eye of the beholder. (6T218, 3T28). The District Court did not permit Dvorak to testify before the jury. (8T53).

On or about March 26, 1981, plaintiff filed a Verified Complaint with the State of New Jersey Department of Law & Safety, Division on Civil Rights, ("NJDCR") alleging sexual harassment by her supervisor. (Stipulations #2.16, p. 2B). On March 30, 1981, Golin notified FMC of the filing of that complaint. (Stipulations #2.17, p. 2B).

Plaintiff's employment with FMC was terminated approximately 10 days later, on April 9, 1981. (Findings #27, App. 47a). Plaintiff was granted two weeks severance pay in lieu of termination notice. (Plaintiff's Exhibit P-13, in evidence 6/26/87).

On April 10, 1981, plaintiff filed with the NJDCR an amended complaint, charging sexual harassment and retaliation. (Findings #29, App. 50a). This complaint was also filed with the

Equal Employment Opportunity Commission. (Id.). The Commission issued a right-to-sue letter on April 20, 1982. (Id.).

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT, AS TO WHETHER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 PRE-EMPTS A CAUSE OF ACTION IN CONTRACT AND TORT AGAINST THE EMPLOYER FOR AN AT-WILL EMPLOYEE'S DISCHARGE MOTIVATED BY RESISTANCE TO SEXUAL HARASSMENT

The petitioner alleges that she was terminated in retaliation for pressing a sexual harassment claim and for filing an employment discrimination charge with the State FEP Agency and the EEOC. (Final Pretrial Stipulation and Order, filed 5/31/84, Section 3.A.4, p. 3).

Petitioner initiated the present action under Title VII and its state

equivalent, and further asserted pendent jurisdiction over the breach of contract, wrongful discharge, and other common law claims arising out of essentially the same allegations of fact. United Mine Workers of America v. Gibbs, 383 U.S. 715, 725-726 (1966).

Prior to trial, the District Court sua sponte dismissed the breach of contract and the wrongful discharge claims against the corporate employer on the ground that these claims are pre-empted by Title VII and its state equivalent. (Transcript of Hearing on Motions In Limine, 1/27/87, pp. 47-50; 8T5; App. 8a). The judge only allowed before the jury the common law claims against the individual defendant. The Court of Appeals affirmed without opinion. (App. 70a-73a).

It is respectfully urged that the decision below is erroneous and at variance with the applicable decisions of the United States Court of Appeals for the Eighth Circuit and the Supreme Court of New Jersey.

In Alexander v. Gardner-Denver Co., 415 U.S. 36, 48-50 & n.9 (1974) this Court has recognized that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., is an independent statutory remedy, not intended to be exclusive, but to supplement other remedies available for unlawful employment practices.

The decision below directly conflicts with the holding of the Court of Appeals for the Eighth Circuit in Lucas v. Brown & Root, Inc., 736 F.2d 1202, 1206-1207 (CA8 1984) that Title VII does not pre-empt an action in contract

and tort against the employer where the discharge is motivated by resistance to sexual harassment on the job. See also, e. g., Savage v. Holiday Inn Corp. Inc., 603 F.Supp. 311, 315 (D Nev. 1985) (Title VII does not bar tort remedies where the discharge is motivated by discriminatory bias against female and older employees). But see Glezos v. Amalfi Ristorante Italiano, Inc., 651 F.Supp. 1271, 1276 (D Md. 1987) (Title VII provides exclusive remedy for constructive discharge motivated by sexual harassment and precludes common law action in tort); Salazar v. Furr's, Inc., 629 F.Supp. 1403, 1409 (D NM 1986) (Title VII preempts tort action for discharge in violation of public policy prohibiting sex discrimination in employment).

Finally, the decision below directly conflicts with the holding of

the New Jersey Supreme Court in Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 536 A.2d 237 (1988) and Giudice v. Drew Chemical Corp., 104 N.J. 465, 517 A.2d 448, 449 (1986), that an at-will employee discharged for pressing an employment discrimination claim or for reporting sexual harassment on the job may maintain a cause of action in contract, or tort, or both against the employer, because such a discharge is in violation of public policy. The Supreme Courts of Arizona and Oregon also have recognized that Title VII does not preclude a common law action in tort for a discharge motivated by resistance to sexual harassment. See Ford v. Revlon, Inc., 153 Ariz. 38, 734 P.2d 580, 586 n.1 (1987) (no error in concurrent filing of federal Title VII claim for sexual harassment and tort claim based upon the same facts); Holien

v. Sears, Roebuck and Co., 298 Or. 76, 689 P.2d 1292, 1303-1304 (1984) (Title VII and state equivalent legislation do not negate a common law action in tort for discharge based on sexual harassment on the job).

It is respectfully urged that Title VII is not an exclusive remedy, and that a cause of action in contract and tort is available in New Jersey to an at-will employee discharged for resisting sexual harassment on the job or for pressing an employment discrimination claim.

These related causes of action in contract and tort are particularly important in an employment discrimination case because they provide the parties with the right to a jury trial, which is not available under either Title VII or its state equivalent.

Furthermore, the action in tort permits the recovery of compensatory and punitive damages, while the monetary damages available under Title VII are limited to back pay.

The importance of the issue presented and the conflict with the applicable decisions of the Eighth Circuit and the Supreme Court of New Jersey justify the grant of certiorari to review the judgment below.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AS TO THE PROPER STANDARD OF PROOF IN AN EMPLOYMENT DISCRIMINATION ACTION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

This is an employment discrimination case of disparate treatment type. The petitioner alleges that she was terminated because she rejected her supervisor's sexual advances and filed an employment discrimination charge with the

State FEP Agency and the EEOC. (Final Pretrial Stipulation and Order, filed 5/31/84, Section 3.A.4, p. 3).

At the end of plaintiff's presentation of evidence in the District Court, the defendants moved for involuntary dismissal under Fed.R.Civ.P. 41(b), for lack of a prima facie case. (7T3). The defendants' motion was denied (8T5), and the case proceeded to a full trial on the merits.

Approximately six months after the trial, the District Court entered judgment for the employer on the ground that the plaintiff did not make out a prima facie case of employment discrimination under Title VII. (App. 60a, 62a, 63a). The District Court further held, in substance, that the plaintiff was terminated for "good cause". (App. 59a-60a). The Court of Appeals affirmed with-

out opinion. (App. 70a-73a).

It is respecfully submitted that this decision is erroneous and contrary to the applicable decisions of this Court.

In an employment discrimination case, it does not matter whether the employer had "good cause" to fire an employee. See, e.g., McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 284-285 (1976). Rather, "[t]he central focus of inquiry in a case such as this is always whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'" Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978) (quoting Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)). See also, e.g., U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715 (1983);

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973).

At trial, Golin presented evidence that the employer treated her less favorably than comparable employees outside her group. (See Section C, pp. 16-19, supra).

The District Court failed to give consideration to this comparative evidence, and entered judgment for the employer on the ground that the plaintiff was discharged for "good cause". (App. 59a-60a). This decision is erroneous and contrary to the holdings of this Court in Aikens, Furnco, McDonald and McDonnell Douglas.

Furthermore, the District Court erred in stating, at the end of the entire case, that the plaintiff failed to make out a prima facie case of employment discrimination under Title VII. (App.

60a, 62a, 63a).

This Court has made it clear that in the Title VII context the phrase prima facie case denotes the establishment of a rebuttable presumption that the employer unlawfully discriminated against the plaintiff. Aikens, 460 U.S. at 714. Where, as here, the employer fails to persuade the District Court to dismiss the action for lack of a prima facie case, and proceeds to offer evidence of the allegedly legitimate reason for the plaintiff's rejection, "the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, [and] whether the plaintiff really did so is no longer relevant." Aikens, 460 U.S. at 715 (emphasis added).

Therefore, in the language of Aikens, the District Court below "errone-

ously focused on the question of prima facie case, rather than directly on the question of discrimination." 460 U.S. at 717.

The importance of the issue presented and the conflict with the applicable decisions of this Court justify the grant of certiorari to review the judgment below.

III. THE DECISION BELOW CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT AS TO A TRIAL JUDGE'S DUTY UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO RECUSE HIMSELF WHEN HE IS PERSONALLY BIASED AND PREJUDICED AGAINST ONE OF THE PARTIES

Before the presentation of evidence in the District Court, the plaintiff filed a motion for recusal under 28 U.S.C. §§ 144, 455(a) and 455(b)(1), asserting that the trial judge was biased and prejudiced against her and in favor of the defendants. The judge

denied plaintiff's motion. (Hearing on Plaintiff's Motion for Recusal, 1/16/1987 and 1/30/1987). The Court of Appeals affirmed without opinion. (App. 70a-73a).

It is respectfully submitted that this decision violates the Due Process Clause of the Fourteenth Amendment and is contrary to the decisions of this Court.

A fair trial before an impartial tribunal is a basic requirement of the Due Process Clause of the Fourteenth Amendment. See Mayberry v. Pennsylvania, 400 U.S. 455, 465-466 (1971). This Court has noted that "[f]airness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." In re Murchison, 349 U.S. 133, 136 (1955). See also Taylor v. Hayes, 418 U.S. 488, 501-

503 (1974).

It is beyond dispute that "[w]hen the remarks of the judge during the course of a trial, or his manner of handling the trial, clearly indicate a hostility to one of the parties, *** or an alignment on the part of the Court with one of the parties for the purpose of furthering or supporting the contentions of such party, the judge indicates, whether consciously or not, a personal bias and prejudice which renders invalid any resulting judgment in favor of the party so favored." Knapp v. Kinsey, 232 F.2d 458, 466 (CA6), certiorari denied, 352 U.S. 892 (1956) (emphasis added).

In the present case, the district judge's personal hostility to the plaintiff and marked bias in favor of the defendants are evident in the record.

As the trial progressed, the judge repeatedly referred to the plaintiff in a demeaning manner, stating that Golin was "spewing" or "vomiting" her citations, (8T26), that she seemed to have a "script", (8T17), that he would control Golin's anticipated "regurgitation" on rebuttal, (7T73), and that Golin was "filibustering". (6T22-24, 6T29, 11T60).

The judge further displayed his animosity toward the plaintiff by repeatedly failing to address her as "Dr." Golin, while gracefully addressing her former FMC manager as "Dr." John Erjavec. (6T14, 6T109, 6T112, 6T119-120, 6T122; Transcript of Hearing on Plaintiff's Application to Take Deposition, 1/7/87, p. 5, p. 15, p. 17, p. 22; Transcript of Hearing on Plaintiff's Motion for Recusal, 1/16/87, p. 8; correspondence from

Hon. G. E. Brown, Jr., to plaintiff, dated 12/19/86, 12/30/86, 9/29/87, 10/8/-87, 1/25/88, 3/23/88, 1/11/89).

The judge granted the defendants a 5-day continuance based on the alleged discomforts of defense counsel's dog, (9T152, 9T159-160), while repeatedly denying Golin's requests for continuance based on her own illness. (3T8-9, 2T178, 2T188).

The judge credited the individual defendant's "testimony" even when there was none. Despite the fact that Moehringer did not refute Dvorak's testimony on sexual harassment, the judge found Moehringer more "credible" than Dvorak on this point. (App. 61a).

The trial judge's bias against the plaintiff and against women, in general, is further demonstrated by his failure to appoint a woman as the fore-

person of the jury in the present case, even though both juror number 1 and juror number 2 were women and Rule 1:8-4 of the New Jersey Court Rules mandated such appointment. (App. 80a).

This Court has recognized that "the inquiry must be not only whether there was actual bias on [the judge]'s part, but also whether there was 'such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of [one party] and the interests of the [other].'" Taylor v. Hayes, 418 U.S. 488, 501 (1974) (quoting Ungar v. Sarafite, 376 U.S. 575, 588 (1964)). See also Offutt v. United States, 348 U.S. 11, 14 (1954) ("justice must satisfy the appearance of justice").

The Due Process Clause of the Fourteenth Amendment serves to build up

public confidence in the fairness and integrity of the courts, by "generating the feeling, so important to a popular government, that justice has been done." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring).

In the present case, the conduct of the trial judge did not conform to the foregoing standard set forth by this Court. Not only did the district judge openly display his personal animosity toward the plaintiff, but "he figuratively speaking, stepped down from the bench to assume the role of advocate for the [defendants]." Knapp, 232 F.2d at 467.

The district judge sua sponte refused to ask a substantial number of voir dire questions requested by the plaintiff, thereby depriving the plain-

tiff of her right to select an impartial jury. (Transcript dated 1/7/87, pp. 2-19). The judge sua sponte dismissed plaintiff's contract and tort claims against the corporate employer. (Hearing on Motions In Limine, 1/27/87, pp. 47-50; 8T5). The judge sua sponte replaced plaintiff's proposed Special Interrogatories with his own Special Verdict, worded in a highly technical and abstract language which greatly confused the jury. (12T17, 12T28). The judge sua sponte interrupted the plaintiff's summation to the jury, and erroneously prevented her from anticipating the approved instructions. (11T84). The judge erroneously prevented the plaintiff from objecting in the presence of the jury to defense counsel egregious misstatements and flagrant improprieties in summation. (11T20-21). The judge failed to restrict defense

counsel's closing argument to its proper scope, he displayed his hostility to the plaintiff before the jury, and appeared to give his approval to the defense attorney's inflammatory and unsupported attacks on plaintiff's character, credibility and conduct of the case. (11T15, 11T22, 11T24, 11T38, 11T45, 11T47, 11T49). Finally, the judge erroneously excluded significant corroborating and impeaching evidence offered by the plaintiff, (8T8, 3T263, 3T266, 3T280, 5T142, 6T196), highly material in this case which turned essentially on the plaintiff's and the defendant's credibility.

Despite the summary affirmance of the judgment by the Court of Appeals, the record overwhelmingly demonstrates that this petitioner has not received a fair trial, and that justice has not been done in the present case.

The denial of due process and the conflict with the applicable decisions of this Court justify the grant of certiorari to review the judgment below.

CONCLUSION

The questions presented by this case are of great and recurring significance in the administration of Title VII of the Civil Rights Act of 1964 and the Due Process Clause of the United States Constitution. The serious questions of public policy involved here make this case a particularly appropriate one for the exercise of this Court's discretionary jurisdiction.

For the foregoing reasons, it is respectfully urged that this petition for a writ of certiorari should be granted.

Respectfully submitted,
MICHAELA BERESTEANU GOLIN
626 Dutch Neck Road
East Windsor, NJ 08520
Tel. Nr.: (609) 448-6592
Petitioner, pro se

88-1444

Supreme Court, U.S.
FILED
MAR 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

MICHAELA BERESTEANU GOLIN,

Petitioner,

v.

FMC CORPORATION and GEORGE E. MOEHRINGER.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MICHAELA BERESTEANU GOLIN
626 Dutch Neck Road
East Windsor, NJ 08520
Tel. Nr.: (609) 448-6592
Petitioner, pro se

82 pp

TABLE OF CONTENTS

	Page
Opinion Below.	1a
Order of Judgment, entered August 26, 1987	68a
Order of the United States Court of Appeals for the Third Circuit, summarily affirming judgment, entered November 7, 1988.	70a
Order of the United States Court of Appeals for the Third Circuit, denying Petition for Rehearing, entered December 2, 1988.	72a
United States Constitution, Fourteenth Amendment, Section 1	74a
Relevant text of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*..	75a
Relevant text of New Jersey Law Against Discrimination, N.J.S.A. 10:5-12 *et seq*.	78a
Rule 1:8-4 of the Rules Governing the Courts of the State of New Jersey.	80a

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MICHAELA BERESTEANU GOLIN	:	Civil No. 82-2363 (GEB)
Plaintiff,	:	
v.	:	O P I N I O N
FMC CORPORATION and GEORGE E. MOEHRINGER,	:	
Defendants.	:	

BROWN, District Judge

I. Procedural History

Plaintiff, Michaela Beresteau Golin, Ph.D., brought this action against defendants, FMC Corporation ["FMC"] and George E. Moehringer on the grounds that she was discriminated against on the basis of her sex, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) et seq. (1976) and in violation of the New Jersey Law Against Discrimination ["NJLAD"] N.J.S.A. §§

10:5-12(a) and 10:5-12(d). Additionally, she contends that the defendant FMC, by effecting her termination, committed a common law breach of contract, and through Moehringer, her supervisor, committed a common law tort of assault and battery, malicious interference with contract, and a prima facie wrongful discharge tort. The plaintiff also alleges that Moehringer committed an assault and battery, prima facie wrongful discharge tort and maliciously interfered with her employment contract in violation of state common law.

Plaintiff filed her original complaint against FMC and Moehringer on July 29, 1982. She alleged, against FMC, a violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e), et seq., the Law Against Discrimination of the State of New Jersey,

N.J.S.A. § 10:5-12 for sexual harassment; and pendent state tort claims for assault and battery and breach of contract. She alleged, as against Moehringer, the pendent state tort claim of assault and battery. By amendment of her complaint, dated February 6, 1984, plaintiff realleged her earlier causes of action, and alleged a newly asserted count against both defendants for the common law tort of malicious interference with the employment contract and wrongful discharge.

During the course of discovery, plaintiff and her counsel apparently reached an impasse. Counsel was relieved and plaintiff proceeded pro se. Because of plaintiff's pro se status, this Court attempted to accommodate her whenever possible. Nevertheless, pre-trial and trial proceedings became increasingly disruptive due to plaintiff's conduct

and, as a result, the Court ordered monetary sanctions against plaintiff on four separate occasions.

On April 23, 1986, when this case was four years old (the Final Pretrial Order having been filed on June 5, 1984), I held a status conference in anticipation of setting this case down for an early trial date. The case was one of the oldest on the Court's docket and both parties had sought a prompt trial date. Shortly thereafter, defendant Moehringer's counsel was suspended from the practice of law (for matters wholly unrelated to this case), and new counsel was substituted.

On October 17, 1986 by telephone conference call, I ordered trial briefs to be submitted by December 17, 1986 and allowed limited redepositions of the parties to be taken by that date. I

ordered the trial date to be set for January 7, 1987.

On December 17, 1986, the plaintiff filed a motion to extend discovery and adjourn the trial date. The motion was denied.

On January 7, 1987, a jury was selected, and the parties were advised at that time that trial would go forward as soon as the trial then in progress concluded.

On January 13, 1987 the plaintiff filed a motion for my recusal based in part on my refusal to grant a further adjournment. That motion, along with the plaintiff's renewed motion for a continuation of discovery and adjournment of the trial data, was argued on January 16, 1987 and were denied. Plaintiff's motion for a certification of the order denying recusal and denying continuation of the

trial was also denied.

Motions in limine were then rescheduled for January 19, 1987, a federal holiday, in order that trial could commence on January 20, 1987. By special accommodation, the federal courthouse was opened and supporting clerical and security staff reported to work. Nonetheless, the plaintiff failed to appear for hearing or the motions. The motions were adjourned until January 20.

The plaintiff failed to appear on January 20. Defendant's motion for involuntary dismissal of the complaint pursuant to Fed.R.Civ.P. 41(b) was denied without prejudice to renew. At that time the Court issued an Order to Show Cause why the complaint should not be dismissed for failure to prosecute and for failure to comply with Court orders. The order was returnable on January 22, 1987. The

United States Marshal was ordered to serve the order personally.

Plaintiff finally appeared in response to the Order to Show Cause on January 22. At her request, the Court ordered the motions in limine to be heard on January 27, 1987, and the trial to be continued until January 28, 1987. At the hearing on January 27, the trial date was again adjourned at plaintiff's request until January 30.

On January 30, plaintiff and defendants made opening statements, but the plaintiff stated that she was not prepared to proceed with witnesses. Trial was again adjourned to re-commence on February 2. Further trial delays followed, including one on February 10 when plaintiff again failed to appear requiring yet another order to show cause and further monetary sanctions. The case

finally went to the jury on February 17.

At the outset of this trial, the Court assumed jurisdiction of the pendent state law tort claims as properly arising out of a common nucleus of operative facts, and permitted trial on these issues before the jury. After motion by defendants, and argument by the parties, this Court dismissed the breach of contract claim against FMC (Vol. 5, p. 111, lines 1-3), and also subsequently concluded that all tort claims against FMC Corporation were subsumed under the claims arising under Title VII and NJLAD. (Vol. 8, p. 25, lines 9-11). Thereafter, the tort claims of assault and battery and malicious interference with the employment contract against Moehringer were the only issues tried to a conclusion before the jury.

A special verdict form was submitted and the jury returned a verdict for Moehringer on all counts. (Vol. 12, p. 34, line 18 through p. 37, line 3). By special verdict, the jury found by a preponderance of the evidence that Moehringer was not guilty of assault, not guilty of battery, and not guilty of malicious interference with employment, (Vol. 12 p. 35, line 4 through p. 36, line 25), under the law and facts as charged. (Vol. 11, p. 123, line 12 through p. 132, line 8).

This Opinion resolves plaintiff's Title VII and NJLAD claims. This Opinion incorporates and adopts as the order of this Court the special verdict of the jury as to all claims against defendant Moehringer, and constitutes this Court's findings of fact and conclusions of law as to all issues in the sex discrimina-

tion case tried before the Court, pursuant to Federal Rule of Civil Procedure 52(a).

As will be noted by specific reference throughout this Opinion, the testimony of the plaintiff conflicted with that of the defendant Moehringer and with defense witnesses on many crucial points. This Court had ample opportunity to observe the demeanor of the witnesses and to assess their credibility. I find, as did the jury, that, where there was a conflict of testimony, the testimony of the plaintiff was not worthy of belief, and that the testimony of the defendants' witnesses was credible.

Although plaintiff's conduct at the trial was frequently disruptive and improper, this Court took every precaution to assure that the jury was unaware of such actions. Similarly, in assessing

the credibility of plaintiff as a witness for the purposes of this Opinion, I have not considered any of the conduct which occasioned the sanctions and reprimands. I have based my evaluation solely on her testimony itself, her demeanor, interest in the case, the extent to which she was supported or contradicted by other evidence which I found credible in accord with the established tests for determining a witnesses' credibility. See, e.g., Devitt & Blackmar, § 17.01 et seq. (3Ed. 1977)

II. FINDINGS OF FACT

1. Plaintiff was employed by FMC at its Princeton, New Jersey Research and Development Center as a Senior Programmer/Analyst from November 1979 until April 9, 1981 (Vol. 5, p. 152, lines 9-11, p. 155, lines 14-15, Vol. 6, p. 36, lines 12-13). During most of her employ-

ment, except for a period between July 1980 and October 1980 when she was temporarily transferred to another group, she was assigned to work in the Technical Computing Services ["TCS"] Group and was directly under the supervision of defendant Moehringer. (Vol. 5, p. 152, lines 9-11, p. 153, lines 12-14, p. 161, lines 8-11, p. 164, line 17 through p. 165 line 2).

2. Plaintiff was granted a Doctor of Philosophy (Ph.D) degree in theoretical nuclear physics from Rutgers University in 1975. The defendants did not dispute that throughout her educational years, plaintiff was consistently at or near the top of her class. (Vol. 9, p. 89, line 9). Upon receiving her doctoral degree, plaintiff was employed as a post-doctoral research associate at Florida State University from 1975 through 1976.

Between 1976 and December 1978, plaintiff was employed as a Research Associate at Brookhaven National Laboratory. (Vol. 5, p. 148, line 25 through p. 149, line 9).

3. Prior to being hired, plaintiff was interviewed by Moehringer, Dr. John Erjavec, and David Hall. (Vol. 5, p. 151, lines 7-10). Hall testified that after he interviewed Golin he recommended to Moehringer that she not be hired on the grounds she would not discuss her background or her previous employer. (Vol. 6, p. 266 line 10 through p. 267, line 12). Hall also testified credibly that he would not have hired the plaintiff as a senior programmer/analyst due to her lack of computer science experience and because he did not believe she could do systems analyst work. (Vol. 6, p. 265, line 18 through p. 266, line 5). Erjavec and Moehringer decided nonetheless to

hire Golin because the position they were seeking to fill had been vacant for almost two years, and because they previously had employed a Ph.D. in the position with the positive results. (Vol 6, p. 267, line 13 through p. 268, line 4). Moehringer thought that plaintiff would be a satisfactory employee if she were motivated to do non-scientific work, could learn the work area independently and rapidly, and interface well with scientists. (Vol. 2, p. 81, lines 14-20, JD-6).

After being hired, plaintiff was assigned to work in the TCS group which was supervised by defendant Moehringer and managed by Erjavec. Erjavec also managed three other groups: Automation and Instrumentation Services, ["A&IS"], Process Analysis, and Statistical Analysis. (Vol. 6, p. 101, line 24 through p.

102, line 3). Erjavec was ultimately responsible for hiring and discipline decisions, and defendant Moehringer recommended and participated in the hiring, firing, training, promotion, and discipline of his subordinates. (Vol. 2, p. 11, line 10 through p. 18, line 5). From 1968 to 1979, Moehringer supervised approximately 20 employees at FMC. (Vol. 8, p. 138, line 11).

4. Moehringer testified credibly that shortly after plaintiff began with FMC, he became disappointed with her performance. Moehringer testified that Golin's work significantly exceeded time estimates and was programmed inefficiently and unsuccessfully. He testified that she refused his assistance and would not demonstrate her work to him. He communicated this disappointment to his manager, Erjavec, who urged Moehringer to continue

working with plaintiff to improve her performance because the position was a difficult one to fill, and because FMC had spent about $6,000 on an agency fee to recruit the plaintiff. (Vol. 8, p. 141, lines 2-21, p. 143, line 16 through p. 144, line 12, p. 145, line 5 through p. 151, line 19).

5. In February 1980, Golin was assigned to the FARMS Index Project which was a medium-sized project with an intermediate level of difficulty estimated to take approximately six weeks. (Vol. 8, p. 162, line 12 through p. 163, line 5). The plaintiff spent 22 weeks on this project and the program only functioned minimally after the work was completed. (Vol. 8, p. 164, lines 1-7). The program was replaced the following year by one created by another programmer outside of Moehringer's group. The customer was

dissatisfied with Golin's work, and did not use Moehringer's group to complete the assignment, or for any other work for five Years. (Vol 8, p. 166, lines 6-14).

6. During plaintiff's work on the FARMS Index Project, she refused to communicate interim progress to Moehringer. She avoided him, skipped scheduled meetings, and hung-up when he called on the telephone to inquire about the program. She did not show him a single line of code, a flow diagram or documentation. In late February or early March of 1980, Moehringer complained to Erjavec about the plaintiff's job performance. (Vol. 8, p. 151, line 1 through p. 60, line 21). Also in late February 1980, Golin complained to Erjavec, in Moehringer's presence, about his habit of "walking into her" and standing close to her when discussing work assignments. (Vol. 5, p.

163, line 8 through p. 164, line 2).

7. The plaintiff testified that in late April 1980, she was to give a presentation in Middleport, New York. She testified that three other FMC Princeton employees, including Moehringer, and one Philadelphia employee were to be there. The plaintiff testified that Moehringer insisted that she go up the night before with him and one of the other employees and that she spend the night in the hotel provided by FMC. Golin testified that Moehringer became very angry when she decided to go to Middleport the morning of the presentation rather than to travel with him the night before. Golin acknowledged that Moehringer never suggested that they share a room. (Vol. 5, p. 160, line 12 through p. 161 line 3).

Plaintiff testified that subsequent to the Middleport incident conflicts with

Moehringer became more frequent. (Vol. 5, pp. 161-62). Plaintiff's account was not credible. Based upon my assessment of the credibility of Golin and Moehringer, I find that Moehringer's denial of the incident was credible. (Vol 9, p. 68, line 1). I am unable to give any credence to the plaintiff's interpretation of the facts. As was the case throughout the trial, the evidence simply does not support the plaintiff's version of the facts, nor does it support the inferences and conclusions the plaintiff draws and seeks to have this Court draw.

8. In late May or early June 1980, Moehringer complained to Erjavec in writing about the plaintiff's performance and requested Erjavec to allow him "to exercise the perrogative [sic] [he had] as the supervisor of a new exempt employee and discharge her from FMC before the

problems become more serious." (JD-17; Vol. 9, p. 21, line 17 to p. 23, line 12). Erjavec did not approve the recommendation to discharge. (Vol 6, p. 163, line 5).

9. In late July 1980, Erjavec arranged for plaintiff to be transferred temporarily to the A&IS section to work under the direction of David Hall and Mike Zadoff. (Vol. 6, pp. 164-65, p. 235, line 20 through p. 236, line 3, P. 12). Golin worked in this group until October 1980, (Vol. 5, p. 164, line 17 through p. 165, line 2 and p. 166, lines 19-24), at which time she returned to her regular group and was again under the direct supervision of Moehringer. (Vol. 9, p. 24, lines 9-13). During the temporary assignment, Hall was unable to directly observe the progress of much of plaintiff's work. When requested by Erjavec

for an evaluation in preparation for the plaintiff's November performance review, Hall reported that her work was standard. (Vol. 6, p. 236, lines 4-17). In rating her, Hall did not rate plaintiff as a senior programmer/analyst because he did not think she was one. (Vol. 6, p. 270, lines 15-21). Additionally, although Hall asked Golin for her opinion on the possibility of her being transferred to his group, he testified that he did not want to see this happen because Golin lacked both background to discuss problem areas with users and the ability to formulate problem solutions. (Vol. 6, p. 269, line 7 through p. 270, line 8).

10. About one month after Golin returned to the TCS group, in November 1980, Moehringer provided Erjavec with an 11-page Performance review of her work. (Vol. 9, p. 25, line 11 through p. 26,

line 17, JD-19). The evaluation was provided in anticipation of the plaintiff's annual review, and was intended to provide Erjavec with details concerning projects on which the plaintiff had worked which would substantiate Moehringer's claims that Golin would not be a successful programmer. (Vol. 9, p. 26, lines 18-24). Erjavec reviewed this performance evaluation with the plaintiff. She disputed most of the comments made by Moehringer, and claimed that he was highly biased against her. (Vol. 5, p. 170, lines 7-19). Specifically, the plaintiff challenged Moehringer's view that she took two to three times longer than a competent programmer would take to complete her projects. (Vol. 5, p. 177, lines 2-9).

11. Because of the disparity between plaintiff's assertions and

Moehringer's performance evaluation, and because Hall told Erjavec he was unable to supervise plaintiff closely enough to provide an independent estimate, Erjavec decided to replicate some of the work previously done by Golin to attempt an independent evaluation and formulate a more precise basis on which to recommend annual salary action for plaintiff. He selected an assignment on which plaintiff had expended and logged 44 hours and which she had not completed. Moehringer had estimated that it would take approximately one day to complete. (Vol. 9, p. 28, line 11 through p. 29, line 3). Although he had little recent computer programmer experience and had never used this computer before, Erjavec completed the assignment in 9 hours. (Vol. 6, p. 102, line 17 through p. 103, line 4, p. 165, lines 3 through line 13; p. 166; and

p. 229, lines 5-16). He concluded that Moehringer's time estimate was reasonable. (Vol. 6, p. 230, lines 17-19).

12. As a result of his own review, Hall's evaluation and the performance evaluation of Moehringer, Erjavec determined that, on balance, the plaintiff, for her first full year's work, should be rated a 2, (satisfactory, but requires improvement - some objectives not met), and he recommended her for a 5.8% salary increase. (Vol. 6, p. 107, lines 13-21; p. 126, line 24 through p. 128, line 25; p. 133, line 14 through p. 134, line 8, and p. 231, lines 3-25). In the comments section of the performance review, Erjavec wrote:

> This has been Dr. Golin's first year with FMC and she has a significant amount of learning to do. Although she is an experienced scientific Fortran programmer, she had to learn the DEC PDP 11/70 system, the VAX 11780 sys-

> tem and some new software packages such as DRS. However, even taking this learning curve into account, there seems to be progress required to bring her to full expected efficiencies. Her two main strengths in her performance are her good interaction with users and her good program documentation. Her weaknesses appear to be software development effort taking two to three times that expected by her supervisor, George Moehringer, and software that runs more slowly than anticipated by her supervisor. These could both probably be overcome with more frequent communication and, initially, direction.

(P-12; Vol. 6, p. 126, lines 11-25). Erjavec also testified that he was hoping that the plaintiff's work would improve through counseling and coaching by Moehringer. (Vol. 6, p. 166, lines 20-22). Erjavec also advised Golin that she should report to Moehringer in his office to keep him informed of her work and for

coaching. (Vol. 5, p. 179, lines 12-21).

Golin acknowledged at trial that she would not meet with Moehringer in his office to discuss her work. (Vol. 5, p. 192, lines 20-21). She testified that she and other group members requested that Moehringer hold group meetings, but that this request was denied. (Vol. 5, p. 191, lines 18-19). Plaintiff implied that this refusal was directed towards creating a situation where Moehringer could be alone with her, in furtherance of his harassment. However, the testimony of other FMC employees who worked under Moehringer refutes Golin's implication. Specifically, Golin was not the only employee who requested and was refused group meetings; all requests were refused. (Vol. 3, p.78, lines 16-23). Further, all of the employees met regularly with Moehringer in his office to

discuss the progress of their work. (Vol. 3, p. 86, line 24 through p. 87, line 21). None testified that this was harassing, and in fact did testify that they expected to discuss their work with Moehringer because he was the supervisor. (Vol. 3, p. 126, line 16-22).

13. During the time between November 1980 and February 1981, the plaintiff continued to work under the supervision of Moehringer. Moehringer testified that during this period the plaintiff continued to take too long to complete projects and programmed inefficient programs. (Vol. 2, p. 34, lines 11-21, Vol. 9, p. 24, lines 14-25)

14. In February 1981, plaintiff submitted a request to attend a Macro/Fortran systems services training course. Moehringer felt that this particular course was inappropriate and rejected the

request. Subsequently, the plaintiff spent 30 hours of company time seeking to reverse the decision. Plaintiff fought the refusal and appealed to Erjavec who on February 13, 1981, denied the training authorization request. In a memo to the plaintiff, Erjavec wrote: "Signing up for courses should be discussed and approved by an employee's supervisor. Since [Moehringer] does not feel that this course is an appropriate one for you, please cancel your reservation if you have one." (JD-27). Erjavec thought the plaintiff's action in spending 30 hours to seek reversal was outrageous. (Vol. 9, p. 31, line 9 through p. 32, line 19, p. 34, line 17 through p. 35, line 5, Vol. 6, p. 234, lines 3-11).

15. On February 20, 1981, at a meeting between Golin and Erjavec, Erjavec explained to plaintiff that

Moehringer was still unhappy with her work, and that Moehringer had advised him that the plaintiff should be terminated. (Vol. 9, p. 39, line 3 through p. 40, line 5). Erjavec told Golin she was not being fired on the spot but suggested that she might be wise to seek other employment. (Vol. 6, p. 192, lines 13-16, p. 193, lines 8-10). The basis for this advice was Golin's failure to seek advice or coaching and her failure to make any progress. Erjavec believed Golin was lacking in important areas which could have been improved if she interacted more with Moehringer and sought his advice, but because she did not do this, Erjavec felt the situation hopeless. (Vol. 6, p. 192, line 19 through p. 193, line 7).

At this time, the plaintiff requested and was granted a two-week vacation to begin immediately. (Vol. 6, p. 222, lines

17-22). The plaintiff was on vacation from February 23, 1981 through March 9, 1981. (Stip. ¶ 2.10). The plaintiff testified that during the week of February 23 she returned to FMC and spoke with Burton Friedman, Personnel Supervisor, concerning the denial of her request for the course training. She testified that she confided in Friedman that she believed Moehringer denied her request because she refused his sexual advances. (Vol. 5, p. 195, line 2 through p. 196, line 12). This testimony, although not specifically refuted, was not corroborated by testimony by Freedman.

16. On March 4, 1981, Moehringer wrote a memorandum to Erjavec stating: "I have reached a definite decision on M. Golin. She has to go. I can't put up any longer with a person of her incompetence level in a job that is key and

critical to my whole area." (Vol. 6, p. 223, line 10 through p. 224, line 7, JD-29). In this writing, Moehringer set forth what he had told Erjavec at their meeting immediately prior to Erjavec's meeting with plaintiff on February 20, 1981. (Vol. 9, p. 40, line 25 through p. 41, line 8). Moehringer felt he had to take a tough stand with his management, whom he was not sure agreed with his decision to terminate. In the March 4 memo, Moehringer wrote, "If I have to force Golin out, the scenario can be so bloody that there may be no survivors." (Vol. 2, p. 37).

17. While Golin was on vacation, Erjavec learned that Moehringer's group did not have available work for her, because users were not happy with her work product. Erjavec therefore concluded that when plaintiff returned from vaca-

tion he would terminate her if she did not resign. (Vol. 6, p. 224, line 17 through 225, line 17). He had reached this decision by March 4, 1981, (Vol. 6, p. 247, lines 4-11), but he did not take any steps to implement the decision. Erjavec went on vacation until March 12, 1981. (Vol. 6, p. 249, line 13).

18. On Monday, March 9, 1981, plaintiff returned to work from her vacation. Moehringer met with her in his office. He gave her a memorandum reprimanding her for failing to adhere to regular working hours. The memo warned that as of March 11 her pay would be reduced for not reporting to work on time. (P-20; Vol. 5, p. 197, line 17 to p. 198, line 13). The plaintiff had a history of lateness with FMC. At trial, Golin did not dispute that she did not adhere to the work hours she was given. Rather,

she argued that because she worked after hours and because other employees and a consultant had different work hours, Moehringer was unreasonable in asking her to work from 8:00 a.m. to 4:30 p.m. As Golin argued in her closing, (Vol. 11, p. 98, lines 19-25), she believed that Moehringer wanted to degrade and humiliate her and, therefore, directed her to comply with work hours.

I found that the conclusions drawn by the plaintiff with regard to this issue were unsupportable. First, although it was the testimony of David Hall that he did not always work from 8:00 a.m. to 4:30 p.m., Hall did not work under the supervision of Moehringer. (Vol. 6, p. 257, lines 1-6, p. 259, line 2). Golin did not offer the testimony of anyone else in her group, or the testimony of anyone who worked under Moehringer, to

corroborate her claim that she was in some way being singled out by being required to work regular hours. Second, the testimony of Robert G. Kiessling that he did not have set working hours, was totally irrelevant on this point. Kiessling was a computer consultant for a company called NSA (and Arms, Incorporated) and was assigned to FMC. He was not employed by FMC. (Vol. 8, p. 92, line 14 through p. 94, line 15).

Moehringer also reprimanded Golin for failing to report to his office as she had been directed. Defendant Moehringer testified that on Monday, March 9 he told her he had recommended to Erjavec that she be terminated. It was during this meeting, for the first time, that plaintiff told Moehringer she was reluctant to go to his office because he made passes at her. She had never before

accused him of this. (Vol. 5, p. 198, line 24 to p. 199 line 4; Vol. 9, p. 41, line 17 through p. 42, line 12). Plaintiff then went to the Personnel Department and contacted Mr. Ed Politi, an Employment Supervisor, and reported to him that Moehringer had been making passes at her. (Vol. 5, p. 199, lines 5-14).

19. Plaintiff alleged that, while under the supervision of Moehringer, she was subject to sexual harassment by him. The events complained of were: Moehringer walking into her each time he came to her office to discuss professional matters, (Vol. 5, p. 153, lines 16-20); Moehringer telling her she could be raped if she worked after hours, (Vol. 5, p. 154, lines 18-22); Moehringer frequently asking for rides home, (Vol. 5, p. 155, lines 9-21); Moehringer rubbing her face with her coat lapel, (Vol. 5, p.

156, line 2 through p. 158, line 22); Moehringer telling plaintiff he would like to hug her, (Vol. 5, p. 159, lines 10-16); Moehringer becoming angry with plaintiff because she refused to go to Middleport, New York, with him the evening before a presentation, (Vol. 5, p. 160, line 12 through p. 161, line 3; Vol. 9, p. 68, lines 9-25), and Moehringer telling her that a subordinate must do everything to please her boss. (Vol. 5, p. 161, lines 8-11). Moehringer denied ever sexually harassing plaintiff or committing any of the acts alleged. (Vol. 8, p. 155, line 17, through p. 156, line 4; Vol. 9, p. 46, lines 12-15, p. 68, lines 9-23, p. 69, lines 6-24, p. 71, lines 1-11).

By special verdict, the jury found by a preponderance of the evidence that Moehringer neither "intentionally

attempted or offered to touch plaintiff Golin with unlawful force against her will," nor "intended to cause such physical contact with plaintiff Golin or intended to cause her immediate apprehension of such contact." The jury also found that "Moehringer did not actually and intentionally [touch] the person of plaintiff Golin (i.e., her body or clothing) with unlawful force against her will[.]" These findings on the assault and battery claims are relevant because the plaintiff asserted the same facts as the basis of her non-jury claims.

The jury also found that Moehringer did not maliciously interfere with Golin's employment. Again, the facts Golin offered to support this claim are the same as those offered in support of her federal and state law employment discrimination claims.

20. On March 11, 1981, the plaintiff received a two-page memorandum from Moehringer in which he informed her that she would be discharged. In support of this move he cited her inability to complete assignments on time, the poor quality of her work and her lack of cooperation. (P-14; Vol. 5, p. 201, line 16 through p. 202, line 24).

21. Upon Erjavec's return to FMC on March 12, 1981, Golin met with Erjavec and Mr. Maurice Duggan, Personnel Manager, and complained to them about Moehringer's alleged sexual overtures. She also then suggested for the first time that other female subordinates had experienced similar problems with Moehringer. (Vol. 5, p. 199, line 15 through p. 200, line 19).

22. Upon plaintiff's complaint of sexual harassment, FMC appointed Ms.

Judith Schunn and Ms. Suzanne Donnelly, professional personnel employees from outside FMC's Princeton facility, to conduct an internal investigation into the allegations. (Vol. 6, p. 175, lines 11-21). These investigators interviewed Golin, Erjavec, Moehringer, and a large number of FMC employees. (Vol. 6, p. 187, lines 4-5). One female employee, Barbara Dvorak, went to Erjavac, before she had been contacted by these investigators, and suggested that she should be interviewed because she believed she had a similar experience with Moehringer. (Vol. 3, p. 28, lines 3-7, Vol. 6, p. 204, line 19 through p. 205, line 18). There is no indication that the investigators did not intend to talk to Dvorak; the record indicates that the investigators simply had not had the opportunity to talk to Dvorak prior to the time she raised the concern

with Erjavec. The FMC investigators concluded that any statements made by Moehringer to Dvorak were innocuous. (Vol. 6, p. 189, lines 20-21).

23. Dvorak's testimony was heard by the Court outside the presence of the jury for a determination of relevance as to the jury issues in the case, and for consideration on the plaintiff's Title VII claims. I ruled that this testimony would not be allowed before the jury because it was too remote to plaintiff's complaint, and the relevance on the question of the assault and battery and tortious interference claims was very slight. (Vol. 3, p. 57, lines 11-18, p. 58 line 25).

Dvorak testified that between 1968 and 1971 she was working for Moehringer. At that time she was experiencing personal domestic problems, as she was separat-

ed and living alone in a new apartment. She testified that Moehringer suggested, on different occasions, that she invite him to see her apartment. (Vol. 3, p. 25, line 19 through p. 26, line 20). She interpreted Moehringer's conduct as "making passes". (Vol. 3, p. 26, line 25 through p. 27, line 1). Dvorak also described his behavior as moody, erratic, and stated that Moehringer played "head games". (Vol. 3, p. 36, line 19 through p. 37, line 9). In 1971, Dvorak resigned her job at FMC, for personal and professional reasons. (Vol. 3, p. 37, line 20). In 1973, she returned to FMC, again worked for Moehringer, (Vol. 3, p. 19 through p. 20, line 12), was given a number of salary increases, and achieved several promotions since the alleged incident.

Dvorak did not testify that the environment at FMC was sexually harassing at any time during plaintiff's tenure. She testified to no recent relevant experience with Moehringer. (Vol. 3, p. 31, lines 6-9).

24. Before concluding their internal investigation, the FMC investigators urged plaintiff to provide them with names of other females allegedly sexually harassed by defendant Moehringer. The plaintiff was reluctant to provide names and, in fact, never did provide any names. (Vol. 6, p. 186, line 18-25). Golin advised Judy Schunn that if assurances against retaliation were given in writing, she would provide witnesses. In conversation between the plaintiff and Judy Schunn, (P-38), surreptitiously tape-recorded by the plaintiff, Ms. Schunn indicated that she wanted to ad-

vise the people at Princeton that plaintiff agreed to identify her witnesses if she was given written assurance that she would not be retaliated against. The plaintiff responded that a written assurance would be sufficient security. (Vol. 6, p. 57, line 10 through p. 58, line 6).

Nick Derrough, Corporate Manager for Equal Employment Opportunity, provided Golin with the written assurance requested. (JD-45). Derrough's letter sets forth the prohibition against retaliation for providing information which supports, clarifies, or documents a problem or charge of discrimination or harassment. It further sets forth the intent of FMC's EEO policy to encourage internal resolution of possible problems. (Vol. 6, p. 39, line 12 through p. 40, line 4).

25. Erjavec also suggested to Golin that she provide names of other women,

(Vol. 6, p. 156, lines 10-12), in order to prove Moehringer's alleged bias, (Vol. 6, p. 161, lines 4-17), especially in light of the fact that the internal investigation by FMC was drawing to a close without substantiation of her allegations. Erjavec never told plaintiff that unless she gave FMC names of witnesses, they would have to let her go. (Vol. 6, p. 145, lines 8-19). Erjavec testified that he had decided that if the investigators concluded the allegations were groundless, he would go through with his original intention to terminate Golin for poor performance. (Vol. 6, p. 156, line 21 through p. 157, line 7).

26. At no time during trial did plaintiff testify that she provided names of other women harassed by Moehringer to the investigators or any other employee of FMC, either before or after receiving

such written assurance. At trial, Golin was referred to the portion of her deposition in which she was asked to provide the basis for her claim that FMC had notice of Moehringer's sexual misconduct. Her response at deposition was that it was based on "gossip". Upon further being asked at deposition as to who said anything to her about claimed sexual harassment or advances on behalf of Moehringer, and what was said by that individual or those individuals, plaintiff responded that those were events that occurred more than two years previous to her deposition testimony and that she hated to misquote people. She further stated that she hated to misquote situations, to misinterpret what was said, by whom it was said, and what the words were. She stated that she had certain impressions at the time, but, that

at the time of the deposition, she did not have a clear recollection that would permit her to be fair or accurate or reasonable about any gossip or comments. Golin testified that she had remembered hearing gossip, but did not have, at deposition, recollection of who these people were. (Vol. 6, p. 45, line 8 through p. 47, line 8).

At trial Golin claimed that other women were sexually harassed by Moehringer, and offered the testimony of Gail Breese Wright in support. Wright testified that, during a birthday party held for her by her co-workers at FMC, Moehringer kissed her on the cheek. She testified that she was not offended by this. (Vol 3, p. 84, lines 10-14; p. 104, line 22 through p. 104, line 2). Wright also testified that she traveled with Moehringer on business trips, that they

spent a week in the same hotel and that Moehringer stood closer than a normal person would when he spoke to her or other persons. She testified that none of these concerned her. (Vol. 3, p. 88, line 1 through p. 90, line 11).

Other male and female witnesses also testified that Moehringer stood close to them, and, although this habit made them uncomfortable, they did not find it offensive. (Vol. 3, p. 115, line 16 through p. 116, line 24; p. 176, lines 6-10). Among those so testifying was Jeanne Root who was called by the plaintiff to offer this testimony. I find the testimony of Wright and the other witnesses credible.

27. Plaintiff's employment with FMC was terminated on April 9, 1981. She was continued on pay status until the end of April 1981. (Vol. 5, p. 226, lines 7-15).

28. During plaintiff's employment

at FMC, and thereafter, she surreptitiously tape-recorded or had recorded at her direction, numerous conversations between herself and supervisors and co-workers at FMC and between her husband and Moehringer concerning the matters at issue in this litigation. Three of these tape recordings were submitted by plaintiff as her trial exhibits. I do not find these conversations significant, either as to the case in chief, or for impeachment purposes.

In the first tape offered into evidence (P. 30) plaintiff's husband, identifying himself as a prospective employer, had a telephone conversation with Moehringer about plaintiff's job qualifications. The phone call took place on June 30, 1981 after Golin's termination. In response to questions about Golin's abilities, Moehringer gave some mild

criticisms as well as some positive response. (Vol. 2, p. 105, line 24 through p. 113, line 24).

The second tape offered into evidence (P. 33) was a recording of a conversation between the plaintiff and Erjavec which took place on March 19, 1981. In that conversation Golin asked Erjavec about the possibility of transfer to another group. Erjavec answered that a transfer was not out of the question, but that it would not be necessary if Moehringer was guilty of the conduct charged. However, if Moehringer was not guilty and because there was neither evidence nor corroboration of Golin's charges, then on the basis of Moehringer's evaluation of Golin's work, she would be fired as he had recommended. (Vol. 6, p. 148, line 5 through p. 160, line 4). Erjavec did not dispute the

contents of the tape recording.

The third tape offered (P. 38) was a recording of a conversation between Golin and Judy Schunn, the FMC investigator, in which Schunn advised the plaintiff that there would be no retaliation.

None of the conversations lend support to the plaintiff's case.

29. On April 10, 1981, plaintiff filed with the New Jersey Department of Law and Public Safety Division of Civil Rights, an amended complaint charging FMC with sexual harassment and retaliation. This complaint was also filed with the Equal Employment Opportunity Commission (Vol. 5, p. 226, lines 17-22). That Commission found no probable cause for the charge made by plaintiff and issued a right-to-sue letter on April 20, 1982 (Attachment to Amended Complaint).

III. CONCLUSIONS OF LAW

1. The plaintiff has complied with all preconditions necessary to bring this civil action, founded upon Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e), et seq. (1976), the Law Against Discrimination of the State of New Jersey, N.J.S.A. § 10:5-12, and state law claims, against both defendants.

2. This Court has jurisdiction over the subject matter and of the parties to this action in accordance with 42 U.S.C. § 2000(e)5(f) (3) (1976), and pursuant to 28 U.S.C. §§ 1331 and 1337.

3. The Court has pendent jurisdiction over the state law claims.

4. The Court adopts, confirms, publishes and incorporates as its Order herein the Special Jury Verdict in favor of defendant Moehringer and enters judg-

ment as a matter of law and fact for him on the merits of all issues in this matter.

5. The analytical model for evaluating a complaint of employment discrimination in violation of Title VII was set forth by the Supreme Court in McDonnell Douglas Corporation v. Green, supra, 411 U.S. 792 (1973). Under McDonnell Douglas, a plaintiff alleging employment discrimination must meet the initial burden at trial of establishing a prima facie case of discrimination.

6. When a plaintiff succeeds in establishing a prima facie case, the defendant is then required "to articulate some legitimate, non-discriminatory reasons" for its actions. McDonnell-Douglas Corporation, 411 U.S. at 802. Thereafter, the plaintiff must prove "by a preponderance of the evidence that the le-

gitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Id.

7. To prove her prima facie case of sexual harassment, plaintiff must prove the following;

a. That she belongs to a protected group;

b. That she was subjected to unwanted sexual advances;

c. That the harassment claimed was in fact based upon sex; and

d. That the conduct complained of affected the term, condition,

or privilege of employment. Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); Tomkins v. Public Service Electric & Gas Co., 568 F.2d 1044 (3d Cir. 1977).

8. Sex-based discrimination under Title VII based on sexual harassment may be predicated on either of two forms of harassment - either quid pro quo harassment or hostile work environment harassment. Quid pro quo harassment involves the conditioning of concrete or tangible employment benefits on the granting of sexual favors. Hostile work environment sexual harassment, while not affecting economic benefits, creates a hostile, offensive, or intimidating work environment that substantially impairs the employee's job performance or psychological well-being. EEOC Guidelines on discrimi-

nation because of sex, 29 C.F.R. § 1604.11(a)-(g) (1986). Meritor Savings Bank v. Vinson, 477 U.S. (1986); Henson v. Dundee, supra; Katz v. Dole, 709 F.2d 251 (4th Cir. 1983); Tomkins v. Public Service Electric & Gas Co., 568 F.2d 1044 (3d Cir. 1977).

9. To establish a prima facie case of quid pro quo harassment the plaintiff must prove: (1) that she belongs to a protected group; (2) that she was subject to unwelcome sexual harassment; (3) that the harassment complained of was based upon her sex; and (4) that the employee's reaction to the harassment resulted in an adverse employment decision. Henson v. Dundee, supra. In the context of termination of employment she could show, for example, that her work performance and product output justified her continued employment and that, within the context

of the defendant employer's practice, she would not have been terminated except for the rejection of the sexual harassment Bundy, supra, 641 F.2d at 1953.

10. "[A]n employer is strictly liable for sexual discrimination by supervisors that causes tangible job detriment." Henson, 682 F.2d at 909. To establish a prima facie case of sexual harassment based on a hostile or offensive work environment, the plaintiff must prove: (1) that she belongs to a protected group; (2) that she was in fact subject to unwelcome sexual harassment; (3) that the harassment complained of was based on sex; (4) that the harassment was of such nature and magnitude as to affect a "term, condition, or privilege" of employment; and (5) that the employer knew or should have known of the harassment and failed to take prompt remedial

action. Katz., 709 F.2d at 525; Henson., 682 F.2d at 903-05; Bundy, 641 F.2d at 943; Ferguson v. du Pont de Nemours & Co., 560 F. Supp. 1172, 1197-99 (D. Del. 1983).

11. Plaintiff has failed to establish her case of quid pro quo sexual harassment resulting in a tangible detriment to her employment. First, plaintiff alleged only that Moehringer, her immediate supervisor, harassed her, made passes at her, made suggestive or offensive comments, walked into her, or touched her. No other employee of FMC is alleged to have done anything remotely suggesting sexual harassment, and indeed the record is totally devoid of any evidence suggesting other agents of FMC acted in any such way.

The facts of the interaction between plaintiff and Moehringer were

fully tried to the jury and the jury decided unequivocally that Moehringer did not assault plaintiff and did not maliciously interfere with her employment. Moreover, this Court, having heard all the evidence and evaluated the credibility of all the witnesses, agrees fully with the determination of the jury. The plaintiff's testimony that Moehringer sexually harassed her and made implied "passes" at her was wholly refuted by the credible testiony [sic] of Moehringer and others. Plaintiff's testimony was not credible and seems at best an attempt to twist and distort events, after she was aware of her impending termination, in order to serve her own interest.

The jury finding in favor of Moehringer also compels the conclusion that FMC is not responsible. Corporations, being legal fictions, can only act

through their agents or employees. At a minimum, there would have to be an actor who is found to have done something adverse against plaintiff. Here there is none.

Second, plaintiff was an employee-at-will, and had no reasonable expectation of or basis for a continuation of her employment with FMC. She failed to demonstrate to her employer that she was competent and qualified for continued employment. At best, she was marginally competent and her work habits and disruptive and argumentative behavior justified some strong remedial action, such as termination.

Third, the decision to terminate plaintiff was independently reviewed and ratified by persons who were not involved in, and at that time had no knowledge of, the alleged harassment. Thus,

there is no basis for a finding that plaintiff's response to harassment resulted in the adverse employment decision to terminate her.

12. Plaintiff has also failed to establish a prima facie case of hostile work environment sexual harassment. Plaintiff has failed to establish that there was any sexual harassment much less that Moehringer's supervisors in any way condoned or acquiesced in sexual harassment.

First, the jury decided that Moehringer did not engage in the conduct which the plaintiff seeks to have this Court consider as evidence of harassment.

Second, the plaintiff did not even complain of alleged sexual harassment to anyone in authority at FMC's facilities until after the decision to terminate her had been made, confirmed and ratified by

the appropriate higher authorities.

Third, there is no evidence that any other female employee of FMC experienced any sexual harassment by Moehringer at any time near the period under investigation such that FMC should have been aware of the harassment. No other FMC employee or former employee came forward to voice any such complaint or to support plaintiff. The Dvorak testimony was too remote in time and too dissimilar from the plaintiff's alleged specifics. I find it to be of no probative value even if true. Moreover, the testimony was fully refuted by Moehringer who I find to be credible.

Finally, the record of the actions taken by FMC immediately after Golin made her first allegations of sexual harassment is sufficient evidence that FMC does not condone sexual harassment. FMC's response to the plaintiff's charge was

prompt, fair, and reasonable.

13. To the extent that plaintiff alleges sexual harassment under the provisions of N.J.S.A. 10:5-12, her claims and proofs are subject to the same failing, and she has not made out a prima facie case for all of the same reasons.

14. To the extent plaintiff alleges sex discrimination not related to sexual harassment, she has also failed to establish a prima facie case. The evidence clearly shows that plaintiff was an employee-at-will and not entitled to the expectation of continued employment, absent good cause for termination. Plaintiff has shown no disparate treatment. Moreover, FMC clearly established "good cause" for her termination.

15. Even if the plaintiff had made out a prima facie case of employment discrimination under Title VII or the NJLAD,

FMC has articulated legitimate, non-discriminatory reasons for its decision to terminate plaintiff's employment. The plaintiff has not met her burden by the preponderance of the evidence that such reasons were a pretext for discrimination. Texas Department of Community Affairs v. Burdine, supra, 450 U.S. 248 (1981).

16. To the extent that plaintiff has alleged a retaliatory discharge or a cover-up for her action of coming forward and accusing her supervisor of sexual discrimination, her claim also fails. The plaintiff has failed to establish a prima facie case. Corley v. Jackson Police Dept., 566 F.2d 994 (5th Cir. 1978). As noted by the Court in Hochstadt v. Worcester Foundation for Experimental Biology, Inc., 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222

(1st Cir. 1976), "the employee makes out a prima facie case by showing (1) that she engaged in protected activity, i.e., she opposed unlawful employment practices and participated in Title VII proceedings; (2) that her employer was aware of the protected activities; (3) that she was subsequently discharged and (absent other evidence tending to establish retaliatory motive); (4) that her discharge followed her protected activities within such a period of time that the courts can infer retaliatory motives."

17. In view of the verdict of the jury in favor of Moehringer, my conclusion that there was no sexual harassment and that Moehringer's superiors neither condoned nor acquiesced in any alleged sexual harassment, but rather acted promptly and properly when the complaint was first made, I find that no conduct by

any agent or employee of FMC was in violation, as to the plaintiff, of any provision of the Title VII of the Civil Rights Act of 1964, as amended, or of the NJLAD.

18. I have determined that plaintiff was an employee-at-will. No allegations or evidence or proofs establish any public policy exception to her employment relationship which would invoke the exception to termination set forth in New Jersey under the rationale of Pierce v. Ortho Pharmaceuticals Corporation, 84 N.J. 58 (1980) or its progeny. Moehringer urged Golin's termination for poor performance. This, as determined by the jury, was not a malicious interference with her employment. As determined, neither Moehringer nor any other agent or employee of FMC committed any tortious assault on plaintiff. FMC, to the extent

it accepted and ratified Moehringer's conduct, did not commit any prohibited tortious conduct under the state law claims. Judgment in favor of FMC and against the plaintiff will be entered by the court on the subsumed pendent state law tort claims of assault and battery and wrongful termination and for breach of contract.

19. To the extent that any of the foregoing findings of fact constitute conclusions of law, they are adopted as such. To the extent that any of the foregoing conclusions of law constitute findings of fact, they are adopted as such. Although, to some extent, I may have incorporated language from proposed findings and conclusions submitted by the parties, these findings and conclusions are entirely my own.

Plaintiff's prayer for relief will be denied in all respects and judgment on all counts entered for both defendants. An Order consistent with this Opinion will be entered.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MICHAELA BERESTEANU GOLIN	:	Civil No. 82-2363 (GEB)
Plaintiff,	:	
v.	:	ORDER OF JUDGEMENT
FMC CORPORATION and GEORGE E. MOEHRINGER,	:	
Defendants.	:	

This matter having been tried before a jury on plaintiff's claims against defendant Moehringer for assault and battery and malicious interference with contract, and before this court on plaintiff's claims against both defendants under Title VII of the Civil Rights Act of 1964, as amended, the New Jersey Law against Discrimination and Breach of Contract, and the jury having found no cause for action, and this Court, by Opinion filed this date, having found for defendants, and against plaintiff, and this

Court having previously on the record dismissed plaintiff's other claims,

It is on this 25th day of August, 1987,

ORDERED, that judgment in this matter is entered against the plaintiff Michaela Beresteanu Golin, and in favor of defendants FMC Corporation and George Moehringer, as to all claims with costs.

s/ Garrett E. Brown, Jr.
GARRETT E. BROWN, JR. U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-5054, 88-5233, and 88-5406

Michaela Beresteanu GOLIN,

Appellant in No. 88-5054

vs.

FMC CORPORATION and GEORGE E. MOEHRINGER

Michaela Beresteanu GOLIN,

vs.

FMC CORPORATION and GEORGE E. MOEHRINGER

FMC Corporation,

Appellant in No. 88-5233

Michaela Beresteanu GOLIN,

Appellant in No. 88-5406

vs.

FMC CORPORATION and GEORGE E. MOEHRINGER

Appeal from the United States District Court for the District of New Jersey
(D.C. Civil No. 82-2363)
District Judge: Hon. G. E. Brown, Jr.

Submitted
October 21, 1988
Before: MANSMANN, HUTCHINSON, and VAN DUSEN, Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by each appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

BY THE COURT,

s/ Carol Los Mansmann
Circuit Judge

Attest:

/s/
Sally Mrvos, Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-5054, 88-5233, and 88-5406

Michaela Beresteanu GOLIN,

Appellant

vs.

FMC CORPORATION and GEORGE E. MOEHRINGER

SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, and VAN DUSEN, Circuit Judges.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of

the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

s/ Carol Los Mansmann
Circuit Judge

UNITED STATES CONSTITUTION
FOURTEENTH AMENDMENT
Rights guaranteed
Privileges and immunities of citizenship, due process and equal protection.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State in which they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens in the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, as amended, 42 U.S.C. § 2000e et seq.

§ 2000e-2. Unlawful employment practices.

(a) Employer practices

It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; ***.

§ 2000e-3. Other unlawful employment practices.

(a) Discrimination for making charges, testifying, assisting, or participating, in enforcement proceedings.

It shall be an unlawful employment practice for an employer to discrim-

inate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on the job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

*****

§ 2000e-7. Effect on State laws.

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty,

or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

NEW JERSEY LAW AGAINST DISCRIMINATION
N.J.S.A. 10:5-12 et seq.
Unlawful employment practice or unlawful discrimination

It shall be unlawful employment practice, or, as the case may be, an unlawful discrimination:

a. For an employer, because of the race, creed, color, national origin, ancestry, age, marital status, sex or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual, to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful consideration other than age, from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment; ***.

d. For any person to take reprisals against any person because he has opposed an[y] practices or acts forbidden under this act or because he has filed a complaint, testified or assisted in any proceeding under this act.

*****

N.J.S.A. 10:5-27

*****

Nothing herein contained shall bar, exclude, or otherwise affect any right or action, civil or criminal, which may exist independently of any right to redress against or specific relief from any unlawful employment practice or unlawful discrimination.

RULES GOVERNING THE COURTS
OF THE
STATE OF NEW JERSEY

1:8-4. Foreman.

Juror number one shall be the foreman; but if he shall be selected as an alternate juror or otherwise discharged, then the juror next drawn on the impanelling of a jury, who remains on the jury for the determination of the issues, shall be the foreman.

(3)

88-1444

Supreme Court, U.S.
FILED
APR 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

MICHAELA BERESTEANU GOLIN,

Petitioner,

-vs-

FMC CORPORATION and GEORGE E. MOEHRINGER,

Respondents.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT, FMC CORPORATION

Arthur G. Lash, Esq.
PELLETTIERI, RABSTEIN & ALTMAN
100 Nassau Park Boulevard
Suite 111
Princeton, New Jersey 08540
(609) 520-0900

Counsel for Respondent,
FMC Corporation

69 pp

QUESTIONS PRESENTED

1. As set forth by Petitioner in Petition for Writ of Certiorari.

2. As set forth by Petitioner in Petition for Writ of Certiorari.

3. Did the denial of Petitioner's motion for recusal violate the Due Process Clause of the Fourteenth Amendment.

List of FMC Corporation
(Parent Company)
Subsidiaries & Affiliates
Not Wholly Owned by FMC

Asia Lithium Corporation (Ajia Lichimu Kabushiki Kaisha)
Yodogawa-Ku, Osaka, Japan
Note: Partly owned by Honjo Chemical Company, Ltd.

CBV - Industria Mecanica, S.A.
Rio de Janeiro, Brazil

Centocor, Inc.
Malvern, Pennsylvania

The Chitin Company, Inc.
Cambridge, Massachusetts 02139

Electro Quimica Mexicana, S.A. de C.V.
Mexico, D.F., Mexico
Note: Majority owned by Interindustrias, S.A. de C.V.

FMC Europe, S.A. (Formerly Luceat, S.A.)
Sens (Yonne), France

FMC Gold Company
Chicago, Illinois

FMC-Kramer S.A. Industria E Comercio
Jundiai, State of Sao Paulo, Brazil
Note: Half owned by Kramer Administracao, Ltd.

FMC de Mexico, S.A. de C.V.
Mexico, D.F., Mexico
Note: Majority owned by Group Interindustrias, S.A. de C.V.
Foret, S.A.
Barcelona, Spain

Note: Partly owned by "Coproqui," Commercial e Industrial de Productos Quimicos, S.A.

Freeport/FMC Foreign Sales Corporation
St. Thomas, U.S. Virgin Islands
Note: Majority owned by Freeport Gold Co.

Huron Forge and Machine Company
Detroit, Michigan

L. H. Company, Ltd. (LH Kabushiki Kaisha)
Osaka, Japan
Note: Partly owned by Honjo Chemical Company, Ltd.

Link-Belt Construction Equipment Company
Bannockburn, Illinois
Note: Majority owned by Sumitomo Heavy Industries Ltd.

"Perorsa" - Peroxidos Organicos, S.A.
Barcelona, Spain
Note: Partly owned by LaPorte Industries Ltd. and Solvay

SeparaSystems Inc. (Formerly FMC/Du Pont Food Separations Inc.)
Santa Clara, California
Note: Half-owned by E.I. Du Pont de Nemours and Company

Teknowledge, Inc.
Palo Alto, California

Thai Peroxide Company, Ltd.
Bangkok, Thailand
Note: Half-owned by Indo-Thai Synthetics and its designees

Tokai Electro-Chemical Company, Limited
(Tokai Denka Kogyo Kabushiki Kaisha)
Tokyo, Japan
Note: Majority owned by Asahi Denka Kogyo K.K. and Partly owned by: Furukawa Denki Kogyo K.K.; Fuji Denki Seizo K.K.; The Daiichi Kangyo Bank, Ltd.; Furukawa Kogyo K.K.; Asahi Seimei Hoken Sogo Kaisha

Turegano, S.A.
Valencia, Spain

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF FMC CORPORATION'S SUBSIDIARIES & AFFILIATES NOT WHOLLY OWNED BY FMC	ii
TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	vii
STATEMENT OF FACTS	1
REASONS FOR DENYING WRIT:	
I. THE DISTRICT COURT'S DECISION THAT PETITIONER'S WRONGFUL DISCHARGE CLAIM WAS SUBSUMED BY THE STATUTORY CLAIMS (FEDERAL TITLE VII & NJLAD) DOES NOT PRESENT EITHER SPECIAL OR IMPORTANT REASONS FOR THIS COURT TO EXERCISE ITS DISCRETION AND GRANT THE PETITION FOR CERTIORARI	18
II. THE DISTRICT COURT APPLIED THE PROPER STANDARD OF PROOF IN AN EMPLOYMENT DISCRIMINATION ACTION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964	29

Page

III. THE DISTRICT COURT WAS NEITHER PERSONALLY BIASED NOR PREJUDICED AGAINST PETITIONER 43

IV. CONCLUSION 58

TABLE OF AUTHORITIES

Cases	Page
Aldridge v. United States, 288 U.S. 308, 51 S. Ct. 470 75 L.Ed. 1054 (1931)	52
Alexander v. Gardner-Denver, 415 U.S. 36 (1974)	25, 57
Bundy v. Jackson, 641 F. 2d 934 (D.C. Cir. 1981)	30
Corley v. Jackson Police Department, 566 F.2d 994 (5th Cir. 1978)	41
Dennis v. United States, 339 U.S. 162, 70 S. Ct. 519 94 L.Ed. 734 (1950)	51
Ferguson v. E.I. DuPont de Nemours & Co., 560 F. Supp. 1172 (U.S.D.C. D.Del. 1983)	33
Giudice v. Drew Chemical Corp., 104 N.J. 465, 517 A. 2d 448 (1986)	24
Henson v. City of Dundee, 682 F. 2d 897 (11th Cir. 1982)	30, 32, 33
Hochstadt v. Worcester Foundation for Experimental Biology, Inc., 425 F. Supp. 318, 234 (D. Mass.), *aff'd* 545 F.2d 222 (1st Cir. 1976)	41

Page

Johnson v. Trueblood,
629 F.2d 287, 290-91
(3d. Cir. 1980), *cert. denied*,
450 U.S. 999, 101 S. Ct. 1704
68 L. Ed. 2d 200 (1981) 46

Katz v. Dole, 709 F.2d 251
(4th Cir. 1983) 33

Lucas v. Brown & Root, Inc.,
736 F. 2d 1202 (8th Cir. 1984) ... 24

McDonnell-Douglas Corporation
v. Green, 411 U.S. 792 (1973) .. 29, 31

Phillips v. Joint Legislative
Comm., 637 F.2d 1014
(5th Cir. 1981), *cert. denied*,
456 U.S. 960, 102 S. Ct. 2035,
72 L. Ed. 2d 483 (1982) 46

Rice v. Sioux City Cemetery,
349 U.S. 70, 74 (1955) 22

Shank v. American Motors Corp.
575 F. Supp. 125
(E.D. PA. 1983) 46

Smith v. United States,
431 U.S. 291, 97 S. Ct. 1756,
52 L.Ed.2d 234 (1977) 50

Texas Department of Community
Affairs v. Burdine,
450 U.S. 248; 101 S.Ct. 1089;
67 L.Ed.2d 207 (1981) 31, 40

Page

Tomkins v. Public Service Electric & Gas, 568 F.2d 1044 (3d Cir. 1977) 30

Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 536 A. 2d 237 (1988) 24

United States v. Birges, 723 F.2d 66, certiorari denied, 104 S.Ct. 1926 (9th Cir. 1984) ... 55

United States v. Gordon, 688 F.2d 42 (8th Cir. 1982) 55

United States v. Martin, 746 F.2d 964, 973 (3rd Cir. 1984) 50

United States v. McDonnell, 573 F.2d 165 (3rd Cir. 1978) 50

United States v. Napoleone, 349 F.2d 350 (3rd Cir. 1965) 52

United States v. Peltier, 553 F. Supp. 886, (D.N.D. 1982) .. 47

United States v. Rosales-Lopez, 451 U.S. 182, 101 S. Ct. 1629, 68 L.Ed.2d 22 (1981) 49

United States v. Salamone, 800 F.2d 1216 (3rd Cir. 1986) ... 49, 51

Page

United States v. Segal,
534 F.2d 578 (3rd Cir. 1976) 50

United States v. Townsend,
478 F.2d 1072 (3d. Cir. 1973) 45

United States v. Wendt,
698 F.2d 933 (8th Cir. 1982) 54

United States v. Wooten,
518 F.2d 943 (3rd Cir.),
cert. denied, 423 U.S. 895,
96 S. Ct. 196, 46 L.Ed.2d 128
(1975) 52

Other Authorities:

28 U.S.C. Sec. 144 ..... 43, 45, 46

28 U.S.C. Sec. 455 ..... 43, 46

42 U.S.C. Sec. 2000e *et seq.*
(Title VII) 18, 24, 25, 26, 27, 29,
39, 40, 41

N.J.S.A. 10:5-12 *et seq.* (NJLAD) 18, 40

U.S.D.C. Rule 41(b) 39, 40

U.S. Supreme Court Rule 17 20

STATEMENT OF FACTS

Respondent FMC waives presenting a Statement of the Case except where necessary to correct inaccuracies and omissions in Petitioner's Statement.

Shortly after Petitioner commenced employment with FMC, Moehringer, her manager, became disappointed with her performance. Her work significantly exceeded time estimates and was programmed inefficiently and unsuccessfully. Petitioner refused Moehringer's assistance and would not demonstrate her work to him. Moehringer communicated this disappointment to his manager, Erjavec, who urged Moehringer to continue working with Petitioner to improve her performance because the position was a difficult one to fill

and because FMC had spent about $6,000 on an agency fee to recruit Petitioner. (8T141, 142, 143-144, 145-151). The District Court found the testimony of Moehringer to be credible and where it was in contravention to Petitioner's testimony, that Petitioner's testimony was not worthy of belief (App. 10a).

In February 1980, Petitioner was given an assignment known as the Farms Index Project. It was a medium-sized project with an intermediate level of difficulty estimated to take approximately six weeks (8T162-163). Petitioner spent 22 weeks on this project and never satisfactorily completed it as it only functioned minimally (8T164). The program was replaced the following year by another programmer outside of Moehringer's group. The custo-

mer was dissatisfied with Petitioner's work and did not use Moehringer's group to complete the assignment or for any other work for five years (8T166).

During Petitioner's work on the Farms Index Project, she refused to communicate interim progress to Moehringer. She avoided him, skipped scheduled meetings, and would hang-up if he called on the telephone to inquire about the program. She did not show him a single line of code, a flow diagram or documentation. Moehringer sensed a major problem in this project and communicated his fears to Erjavec (8T152-153). Subsequently, Moehringer, in May/June 1980, recommended to Erjavec that Petitioner be terminated from employment (2T24, 6T162-163). Erjavec

did not terminate Petitioner at this time (6T163).

With reference to the alleged Middleport incident (Petition pgs. 9-10), the District Court did not find Petitioner's Account to be credible (App. 19a). As stated therein,

> Plaintiff's account was not credible. Based upon my assessment of the credibility of Golin and Moehringer, I find that Moehringer's denial of the incident was credible. (Vol. 9, p. 68, line 1). I am unable to give any credence to the plaintiff's interpretation of the facts. As was the case throughout the trial, the evidence simply does not support the plaintiff's version of the facts, nor does it support the inferences and conclusions the plaintiff draws and seeks to have this Court draw. (App. 18a-19a).

As stated by Petitioner (Petition p. 11), she was temporarily transferred to the A&IS group and was rated by David Hall. During the temporary assignment, Hall was unable to afford much time to direct observation of Petitioner's work, and when requested by Erjavec for an evaluation in preparation for the November performance review due Petitioner, Hall merely reported that she was standard, due to lack of evidence to the contrary (6T236). In rating her, Hall did not want to see her transferred to his group as he did not feel she could contribute as she did not have the background to discuss problem areas with users or the ability to formulate problem solutions (6T269-270).

Subsequent to Petitioner's return to Moehringer's group, Moehringer prepared the

11 page evaluation of Petitioner referenced in the Petition (pg. 12). The purpose of the review was to prepare for Petitioner's annual review and to report to Erjavec details concerning projects Petitioner had worked on as Moehringer was sure she would not be a successful programmer (9T26).

Because of the disparity between Petitioner's assertions and Moehringer's performance evaluation and because Hall was unable to supervise her closely enough to provide an independent estimate, Erjavec decided to replicate some of the work previously done by her to attempt an independent evaluation and formulate a more precise basis on which to recommend annual salary action for Petitioner. He selected an assignment on which she had expended and logged 44 hours and had not completed.

Moehringer had estimated that it would take approximately one day (9T28-29). Although he had little recent computer programmer experience and had never used this specific computer before, Erjavec completed the assignment in 9 hours (6T102-103, 165, 229). He concluded that Moehringer's time estimate was reasonable (6T230). Erjavec subsequently rated Petitioner a 2, (satisfactory, but requires improvement-some objectives not met) (App. 24a).

Petitioner (Petition pgs. 16-17) references testimony of Gail Wright and Jeanne Root in which they stated that Moehringer stood close when he spoke to them. Moehringer stood close to males and females, and, although this habit made them uncomfortable, they did not find it offensive (App. 47, 3T 115-116, 176). Root's

responsibility while being supervised by Moehringer was to convert existing programs to a more sophisticated system brought on board by FMC (3T 117-121).

Petitioner (Petition p. 18) alleges Hall's project delays, etc. were performance failures. There is nothing in the trial record supporting Petitioner's claims that the delay's, etc., were performance failures.

With reference to Robert Kiessling beginning work at 9 a.m. (Petition pgs. 18-19), Kiessling was not an FMC employee but rather an independent contractor who was contracted for with the understanding that he could begin work at 9 a.m. (8T 92-94). Hall, whose hours varied, was not under Moehringer's supervision (6T 257, 259). Golin did not offer the testimony of

anyone else in her group, or the testimony of anyone who worked under Moehringer, to corroborate her claim that she was in some way singled out by being required to work regular hours (App. 33a-34a).

Petitioner in her Petition (pgs. 20-21) references a conversation with Burton Friedman in which she allegedly told Friedman her belief that Moehringer denied her request because she rejected Moehringer's sexual advances. This testimony, although not specifically refuted, was not corroborated.

On page 21 of the Petition, Petitioner references a March 9, 1981 conference with Moehringer. Prior to Petitioner advising Moehringer that she was reluctant to go to his office because he made passes at her, Moehringer had advised Petitioner that he

had recommended to Erjavec that she be terminated (5T 198-199, 9T 41-42, App. 34-35).

With reference to the alleged sexual acts complained of by Petitioner, Moehringer denied ever sexually harassing Petitioner or committing any of the acts alleged (8T 155-156, 9T 46, 68, 69, 71).

On page 23 of the Petition, Petitioner alleges that Erjavec suggested to her that she must provide the names of other woman, in order to prove Moehringer's bias (App. 43-44). Erjavec merely suggested that Petitioner provide names of other woman (6T156) in order to prove Moehringer's alleged bias (6T156, 161). He suggested that Petitioner provide the names of other woman in light of the fact that the internal investigation by FMC was drawing

to a close without substantiation of Petitioner's claim and if FMC found her allegations to be groundless, then the original plan was going to proceed, which was the termination of Petitioner based upon poor performance (6T156-157). This, in fact, was done by FMC. Erjavec never told Petitioner that unless she gave FMC names of witnesses, that they would let her go (6T145).

With reference to the testimony of Barbara A. Dvorak (Petition pg. 24), upon Petitioner's complaint of sexual harassment, FMC appointed Judith Schunn and Suzanne Donnelly, professional personnel employees from outside FMC's Princeton facility, to conduct an internal investigation into the allegations (6T175). These investigators interviewed Petitioner,

Erjavec, Moehringer, and a large number of FMC employees (6T187). One female employee, Barbara Dvorak, went to Erjavec before she had been contacted by these investigators and suggested that she should be interviewed because she believed she had a similar experience with Moehringer (3T28, 6T204-205). There is no indication that the investigators did not intend to talk to Dvorak; the record indicates that the investigators simply had not had the opportunity to talk to her prior to the time she raised the concern with Erjavec. The FMC investigators concluded that any statements made by Moehringer to Dvorak were innocuous (6T198).

Dvorak's testimony, which was heard by the Court outside the presence of the jury, was, over 10 years earlier, when working

for Moehringer and experiencing personal domestic problems and separated and living alone in a new apartment, that Moehringer suggested, on several occasions, that she invite him to see her apartment (3T25-26). She did not characterize this as sexual harassment, then or now. His behavior was described as moody, erratic and that he played "head games" (3T36-37). She shortly thereafter quit her job at FMC for personal and professional reasons (3T37). Within a couple of years she returned to FMC, again worked for Moehringer (3T19-20), was given a number of salary increases, and achieved several promotions since the alleged incident. She did not testify that the environment at FMC was sexually harassing during Petitioner's tenure. She has no recent relevant experience with Moehringer

(3T31). Her testimony was not allowed before the jury because it was too remote to Petitioner's jury issues and was not probative of any pattern of an ongoing sexually harassing environment or cover-up (App. 40a). The FMC internal investigators also did not feel that it was of similar gravity to Petitioner's complaint (6T188, 189).

Before concluding their internal investigation , the FMC investigators urged Petitioner to provide them with names of other females allegedly sexually harassed by defendant Moehringer. Petitioner was reluctant to provide names and, in fact, never did (6T186). Petitioner advised Schunn that if assurances against retaliation were given in writing she would provide witnesses. In a taped conversation

surreptitiously recorded by Petitioner, between Petitioner and Schunn, Schunn indicated that she wanted to advise people at Princeton that Petitioner agreed under these circumstances, "written assurance," to identify her witnesses. Petitioner responded that she would do that. Schunn further asked if that was sufficient, to which Petitioner responded that it was (6T57-58).

Nick Derrough, FMC Corporate Manager for Equal Employment Opportunity, provided such written assurance by letter. The letter set forth the prohibition against retaliation for providing information which supports, clarifies, or documents a problem or charge of discrimination or harassment. It further sets forth the intent of FMC's EEO Policy to encourage internal resolution

of possible problems (6T39-40). At no time during trial did Petitioner testify that she provided names of other woman harassed by Moehringer to the investigators or any other employee of FMC, either before or after receiving such written assurance.

Petitioner, at trial, was referred to deposition testimony in which she was asked what she bases her claim that FMC had notice of Moehringer's sexual misconduct. Her response was that it was based on gossip. Upon further being asked at deposition as to who said anything to her about claimed sexual harassment or advances on behalf of Moehringer and what was said by that individual or those individuals, Petitioner responded that those were events that occurred more than two years previous to her deposition testimony and that she

hates to misquote people. She further stated that she hates to misquote situations, to misinterpret what was said, by whom it was said, what the words were, etc. She further alleges that they were impressions at the time and that she does not, at the time of the deposition, have a clear recollection that would permit her to be fair or accurate or reasonable about any of those past gossip comments. She has a memory that she heard gossip, but that was the extent of her memory. She did not have at deposition a clear enough recollection of who these people were. In fact, she had no recollection at all (6T45-47).

REASONS FOR DENYING WRIT

I. THE DISTRICT COURT'S DECISION THAT PETITIONER'S WRONGFUL DISCHARGE CLAIM WAS SUBSUMED BY THE STATUTORY CLAIMS (FEDERAL TITLE VII & NJLAD) DOES NOT PRESENT EITHER SPECIAL OR IMPORTANT REASONS FOR THIS COURT TO EXERCISE ITS DISCRETION AND GRANT THE PETITION FOR CERTIORARI.

Petitioner was terminated from her position at FMC as she could not competently function in the position for which she was hired. This is amply supported by Respondent's Statement of the Case and the District Court's Opinion set forth in the Appendix submitted with the Petition.

Shortly after employment commenced, Moehringer, Petitioner's manager, became disappointed with Petitioner's performance. Her work significantly exceeded time estimates and was programmed in-

efficiently and unsuccessfully. Petitioner refused Moehringer's assistance and refused to demonstrate her work to him (8T141, 143-151). During work on a particular project, Petitioner avoided Moehringer, skipped scheduled meetings, hung-up when he called on the phone to inquire about the program, refused to communicate interim progress or to show him a single line of code, a flow diagram or documentation (8T 151-161). Moehringer's manager, Erjavec, repeated one of the assignments given Petitioner and concluded that Moehringer's assessment of Petitioner exceeding time limits was proper (9T28-29, 6T102-103, 165-166, 229-230). Eventually, she was terminated.

On March 9, 1981, Moehringer advised Petitioner he was recommending her termina-

tion, at which point she accused him of sexual improprieties. Petitioner's testimony and her allegations of sexual misconduct were found unworthy of belief by the District Court. The Court did find the defendants' witnesses believable.

> As will be noted by specific reference throughout this Opinion, the testimony of the plaintiff conflicted with that of the defendant Moehringer and with defense witnesses on many crucial points. This Court had ample opportunity to observe the demeanor of the witnesses and to assess their credibility. I find, as did the jury, that, where there was a conflict of testimony, the testimony of the plaintiff was not worthy of belief, and that the testimony of the defendants' witnesses was credible. (App. 10a).

Rule 17 of the Rules of the Supreme Court of the United States indicates that a

review on writ of certiorari is a matter of judicial discretion and will be granted only when there are special and important reasons therefor. No such special and important reasons exist in the case at bar.

Petitioner claims in her Petition that the District Court's decision to subsume the wrongful discharge claim in the statutory claims, affirmed by the Third Circuit Court of Appeals, is in conflict with decisions of other tribunals and therefore is worthy of review by this Court.

> A federal question raised by a Petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for

> the benefit of the particular litigants. 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic.' *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955).

Respondent does not concede that Petitioner has raised a federal question or one "of substance," but, even if raised, to address it, would be to merely satisfy a scholarly interest in the issue when one considers the facts raised and Petitioner's lack of credibility as found by the Court and jury. To address the issue, the Court would be sitting for the benefit of a particular litigant, the Petitioner in the case at bar. As stated above and as found by the District Court, Petitioner was terminated because she was incapable of performing her job. This was amply

demonstrated by the evidence. Petitioner's claims of harassment and retaliation were found by the District Court not to be credible. Therefore, to accept the Petition would be to do what case law says this Court should not do, entertain an action without "special and important reasons."

Petitioner claims that the District Court's dismissal of the wrongful discharge count, affirmed by the Third Circuit Court of Appeals, is at variance with the applicable decisions of the United States Court of Appeals for the Eighth Circuit and the Supreme Court of New Jersey. Her reliance on the cases cited is misplaced.

The New Jersey Supreme Court has recognized a cause of action for wrongful

discharge in *Velantzas v. Colgate-Palmolive Co.*, 109 N.J. 189, 536 A. 2d 237 (1988) and *Giudice v. Drew Chemical Corp.*, 104 N.J. 465, 517 A. 2d 448 (1986). But, both of these cases involved the question whether the employer's actions violated public policy and therefore gave rise to causes of action for wrongful termination. *Velantzas* apparently never pleaded a statutory violation for discrimination and therefore, the issue whether separate claims for statutory violations and wrongful discharge could co-exist was never raised. Giudice did not involve a discrimination issue.

Petitioner's reliance on *Lucas v. Brown & Root, Inc.*, 736 F. 2d 1202, 1206-1207 (CA8 1984), is misplaced as well. There, plaintiff's Title VII claim

was dismissed as its filing was untimely. Plaintiff was permitted to pursue wrongful discharge claims. The issue whether the tort and contract claims would be subsumed by a statutory claim was never addressed by the court.

Petitioner also relies upon *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974) in support of her argument. This case is inapplicable as well. In *Alexander*, plaintiff, a black, was discharged from employment and filed a grievance under a collective-bargaining agreement which contained a non-discrimination clause. This grievance was submitted to arbitration. The arbitrator found that plaintiff had been discharged for cause. Subsequently, plaintiff filed an action in the District Court for a Title VII

violation, which claim was dismissed because of the prior arbitration. On certiorari, the Supreme Court held that plaintiff was entitled to a trial *de novo* for the Title VII racial discrimination claim. As stated by the court at page 163,

> Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. This conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation. Where the collective- bargaining agreement conflicts with Title VII, the arbitration must follow the agreement.

Therefore, the Court found that:

> that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance arbitration clause of a collective-bargaining agreement and his cause of action under Title VII. The federal court should consider the employee's claim *de novo*. The arbitral decision may be admitted as evidence and accorded such weight as the Court deems appropriate. *Alexander*, pages 164-5.

Alexander, therefore, has no application to the case at bar. It does not deal with the subsuming of state claims by federal acts.

Therefore, Petitioner has not met the necessary tests for this Court to grant the requested relief as she has failed to

demonstrate special and important reasons requisite for granting the relief sought and to demonstrate that the decision of the District Court, affirmed by the Third Circuit Court of Appeals, is in conflict with decisions of the United States Court of Appeals for the Eighth Circuit and the Supreme Court of New Jersey.

II. THE DISTRICT COURT APPLIED THE PROPER STANDARD OF PROOF IN AN EMPLOYMENT DISCRIMINATION ACTION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

The District Court applied the applicable Title VII law to the facts as properly ascertained by the court. The analytical model for evaluating a complaint of intentional impermissible employment discrimination in violation of Title VII continues to be *McDonnell-Douglas Corporation v. Green*, 411 U.S. 792 (1973). That case teaches that a plaintiff alleging such discrimination must meet the initial burden at trial of establishing a *prima facie* case of discrimination.

To prove her *prima facie* case of sexual harassment, appellant must concretely prove the following:

a. That she belongs to a protected group;

b. That she was subjected to unwanted sexual advances;

c. That the harassment claimed was in fact based upon sex; and

d. That the conduct complained of affected the term, condition, or privilege of employment.

Henson v. City of Dundee, 682 F. 2d 897 (11th Cir. 1982); *Bundy v. Jackson*, 641 F. 2d 934 (D.C. Cir. 1981); *Tomkins v. Public Service Electric & Gas*, 568 F.2d 1044 (3d Cir. 1977).

When a plaintiff succeeds in establishing a *prima facie* case, the

defendant is then required "to articulate some legitimate, non-discriminatory reasons" for its actions. *McDonnell-Douglas Corporation v. Green*, 411 U.S. at 802. Thereafter, the plaintiff must prove "by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination," *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253; 101 S.Ct. 1089, 1093; 67 L.Ed.2d 207, 209 (1981). "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.*

To establish a *prima facie* case of sexual harassment based on the denial of a

tangible job benefit or adverse employment decision (*quid pro quo* harassment), the Petitioner herein must have proved (1) that she belonged to a protected group; (2) that she was subject to unwelcome sexual harassment; (3) that the harassment complained of was based on sex; and (4) that the employee's reaction to the harassment resulted in an adverse employment decision. *Henson v. Dundee, supra*.

To establish a *prima facie* case of sexual harassment based on a hostile or offensive work environment (non-*quid pro quo*), the Petitioner herein must have proved that (1) she belonged to a protected group; (2) that she was in fact subject to unwelcome harassment; (3) that the harassment complained of was based on sex; (4) that the harassment was of such nature and

magnitude as to affect a "term, condition, or privilege" of employment; and (5) that the employer knew or should have known of the harassment and failed to take prompt remedial action. *Katz v. Dole*, 709 F.2d at 255; *Henson v. Dundee, supra* 682 F.2d at 903-05; *Bundy v. Jackson, supra* 641 F.2d at 943; *Ferguson v. E.I. DuPont de Nemours & Co., supra*, 560 F. Supp. at 1197-99.

Petitioner has failed to establish a *prima facie* case of sexual harassment - resulting in a tangible detriment to her employment (*quid pro quo* harassment) with FMC for at least three compelling reasons. First, Petitioner alleged only that Moehringer, her immediate supervisor, harassed her, made passes at her, made suggestive or offensive comments, walked

into her, or touched her. No other employee of FMC is alleged to have done anything remotely suggesting sexual harassment, and indeed the record is totally devoid of any evidence suggesting other agents of FMC acted in any such way. Thus, since the facts of the interaction between Petitioner and Moehringer were fully tried to the jury and the jury decided unequivocally that Moehringer did not assault Petitioner and did not maliciously interfere with her employment, it follows inexorably that the jury verdict against Petitioner precludes a finding by the court that some unknown, unnamed, uncharged, non-existent agent of FMC, on these non-facts, was responsible for sexually harassing her, thereby implicating this corporate defendant. Such finding by

the jury in favor of Moehringer compels the conclusion that FMC is also not responsible. Corporations, being legal fictions, can only act through their agents or employees. At a minimum, there would have to be an actor who is found to have done something adverse against plaintiff. Here, there is none. Second, Petitioner was clearly an employee-at-will, and had no reasonable expectation of or basis for a continuation of her employment with FMC. She failed to demonstrate to her employer that she was competent and qualified for continued employment. Her work habits and behavior justified some strong remedial action, such as termination. Thirdly, the decision to terminate Petitioner was independently reviewed and ratified by person who were not involved in, and at

that time had no knowledge of, the alleged harassment. (6T175). Thus, there is no basis for a finding that Petitioner's response to harassment resulted in the adverse employment decision to terminate her.

Petitioner has failed to establish a *prima facie* case of sexual harassment predicated on the maintenance of a hostile work environment (non-quid pro quo) because she has failed to establish that Moehringer's supervisors in any way condoned or acquiesced in alleged sexual harassment. First, as the jury verdict indicates, no such harassment on the part of Moehringer ever occurred. Second, as the findings of fact conclude, Petitioner did not even complain of alleged sexual harassment to anyone in authority at FMC's

facilities until after the decision to terminate her had been made and confirmed and ratified by the appropriate higher authorities. Third, the findings of facts herein demonstrate that, aside from Petitioner, no other female employee of FMC experienced any such harassment near in time as alleged or came forward to voice any such complaint or to support Petitioner. The occasion of the one female who testified as to a problem with Moehringer was so remote and so uncharacteristic of Petitioner's alleged specifics as to be of no probative value, even if fully credited. Finally, the record is clear that FMC does not condone sexual harassment and that they acted promptly, fairly, reasonably and properly to Petitioner's complaints by setting up an independent investigating

committee of professionals from outside the Princeton facility to evaluate the complaints. Even here, Petitioner in part attempted to damage the ability of the committee to determine the truth by refusing to furnish names of other women allegedly sexually harassed.

As stated by the District Court in its Opinion:

> The facts of the interaction between plaintiff and Moehringer were fully tried to the jury and the jury decided unequivocally that Moehringer did not assault plaintiff and did not maliciously interfere with her employment. Moreover, this Court, having heard all the evidence and evaluated the credibility of all the witnesses, agrees fully with the determination of the jury. The plaintiff's testimony that Moehringer sexually harassed her and made implied "passes" at her was wholly

> refuted by the credible testimony of Moehringer and others. Plaintiff's testimony was not credible and seems at best an attempt to twist and distort events, after she was aware of her impending termination, in order to serve her own interest. (App. 57-58a).

Petitioner suggests that because the court denied FMC's motion to dismiss the Title VII claims at the conclusion of her proofs, that she has made out a *prima facie* case. The court denied FMC's motion to dismiss at that time without prejudice to renew at the conclusion of the case as permitted by Court Rule 41(b) (8T85). It is therefore apparent that the court did not make a determination that Petitioner had made out a *prima facie* case at any time prior to rendering its opinion in which it concluded she had not. A compelling

argument could be made that the Court's ultimate determination that she had failed to make out a *prima facie* case was a belated granting of a 41(b) motion.

Even assuming, *arguendo*, that Petitioner had made out a *prima facie* case of employment discrimination under Title VII or the NJLAD, which she clearly did not, FMC has articulated legitimate, non-discriminatory reasons for its decision to terminate Petitioner's employment and Petitioner has not met her burden by the preponderance of the evidence that such reasons were a pretext for discrimination, *Texas Department of Community Affairs v. Burdine, supra*, 450 U.S. 248 (1981).

To the extent that Petitioner has alleged a retaliatory discharge or a cover-up for her action of coming forward

and accusing her supervisor of sexual discrimination, her claim must also fail. First, in order to prevail on such a claim, she must have established a *prima facie* case, which she has not, *Corley v. Jackson Police Department*, 566 F.2d 994 (5th Cir. 1978). As noted by the Court in *Hochstadt v. Worcester Foundation for Experimental Biology, Inc.*, 425 F. Supp. 318, 234 (D. Mass.), *aff'd* 545 F.2d 222 (1st Cir. 1976),

> The employee makes out a *prima facie* case by showing (1) that she engaged in protected activity, i.e., she opposed unlawful employment practices and participated in Title VII proceedings; (2) that her employer was aware of the protected activities; (3) that she was subsequently discharged and (absent other evidence tending to establish retaliatory motive); (4) that her discharge followed her

> protected activities within such a period of time that the Courts can infer retaliatory motives.

Here, Petitioner has again failed to meet the legal requirements for her allegations.

III. THE DISTRICT COURT WAS NEITHER PERSONALLY BIASED NOR PREJUDICED AGAINST PETITIONER.

The District Court properly employed its discretion in denying Petitioner's motion for recusal immediately prior to the presentation of evidence.

Recusal motions are made pursuant to 28 U.S.C. 144 and 28 U.S.C. 455. Sec. 144 states:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term [session] at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Here, Petitioner presented an affidavit to the District Court which was neither timely nor sufficient. Petitioner, in support of her motion for recusal, alleged, in part, conduct occurring in April 1986 and December 1986. She waited until subsequent to jury selection to move for recusal. She alleged in her affidavit conduct such as the Court's refusal to permit her to testify in narrative form;

the Court initially referring to her as "Mrs." and not "Dr."; the Court's refusal to ask all of her suggested *voir dire* questions; the Court requiring Petitioner to update Moehringer's deposition only ten days prior to the beginning of the trial (in fact it turned out to be 24 days before testimony began); the Court's refusal to permit Petitioner to depose FMC's Personnel Director to authenticate files when FMC was willing to stipulate to authenticity; etc.

The mere filing of the affidavit under Section 144 does not automatically disqualify a judge from hearing a case. *U.S. v. Townsend*, 478 F.2d 1072, 1073 (3d. Cir. 1973). It is the duty of the judge to determine whether the affidavit was timely and legally sufficient. Here, as stated above, the affidavit met neither prong.

Additionally, the Third Circuit has specifically held that only extra-judicial bias forms a basis for recusal under either Section 144 or Section 455. *Shank v. American Motors Corp.*, 575 F. Supp. 125, 128 (E.D. PA. 1983); *Johnson v. Trueblood*, 629 F.2d 287, 290-91 (3d. Cir. 1980), *cert. denied*, 450 U.S. 999, 101 S. Ct. 1704, 68 L. Ed. 2d 200 (1981). As is stated in *Shank*, 575 F. Supp. at page 129,

> Perhaps best summarizing the law on this point, it has been held that a motion for disqualification ordinarily may not be predicated on the judge's rulings in the instant cases, nor on a particular judicial leaning or attitude derived from his experience on the bench. *Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1020 (5th Cir. 1981), *cert. denied*, 456 U.S. 960,

102 S. Ct. 2035, 72 L. Ed. 2d 483 (1982); *United States v. Peltier*, 553 F. Supp. 886, 889 (D.N.D. 1982).

Here, Petitioner's allegations do not in any way rise to the level of proving any personal bias or prejudice on the part of the Court. Petitioner's arguments on this issue are frivolous.

As stated above, Petitioner, in part, bases her allegation of bias on the fact that the court did not ask all of her *voir dire* questions.

The Court in its *voir dire* asked the prospective jurors questions eliciting their background; marital and family status; employment history; experience with courts as either a juror, witness or participant; their experience with computers; whether they or an associate have ever been

involved in a claim involving discrimination; whether they have feelings concerning allegations of sexual discrimination, etc. that would prevent them from serving as fair and impartial jurors; whether they or an associate has ever worked for FMC or a company in the chemical industry; whether they have prejudices against foreign born persons or women who work outside the home that would make it difficult or impossible to serve as fair and impartial jurors; and, whether they had any prejudices or biases for or against management or for or against employees supervised by management by virtue of their membership in management or because they were supervised by management.

Petitioner proposed twelve pages of 51 *voir dire* questions which included questions concerning the types of movies

jurors watched; whether they think that men treat each other differently in a work situation than they treat women; whether they have ever been in a situation where a person was cruel to someone just to get even; as well as numerous other questions.

As stated in *U.S. v. Salamone*, 800 F.2d 1216, 1224 (3rd Cir. 1986),

> Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. Because the obligation to impanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the *voir dire*. *U.S. v. Rosales-Lopez*, 451 U.S. 182, 198, 101 S. Ct.

1629, 1634, 68 L.Ed.2d 22 (1981). This discretion extends to the determination of what questions should be asked to the potential jurors. See generally *Smith v. United States*, 431 U.S. 291, 308, 97 S. Ct. 1756, 1767, 52 L.Ed.2d 234 (1977); *United States v. McDonnell*, 573 F.2d 165, 166 (3rd Cir. 1978); *United States v. Segal*, 534 F.2d 578, 581 (3rd Cir. 1976). This 'testing' by *voir dire* remains a preferred and effective means of determining a juror's impartiality and assuring the accused of a fair trial. *United States v. Martin*, 746 F.2d 964, 973 (3rd Cir. 1984).

In the case at bar, the court has questioned the prospective jurors concerning their backgrounds as well as their attitudes about subjects germane to the issues at hand and whether they can be fair and impartial. The court saw fit in the

exercise of its broad discretion to limit the parties' proposed *voir dire*, but yet provided to the parties through its reasonably extensive examination of prospective jurors a reasonable and rational basis for an intelligent exercise of the right to challenge, whether for cause or peremptorily.

The parties knew enough about the background attitudes of the jurors to enable the parties to exercise intelligently their challenges. "The trial court has a serious duty to determine the question of actual bias." *United States v. Salamone*, 800 Fed.2d at pg. 1224, *Dennis v. United States*, 339 U.S. 162, 168, 70 S. Ct. 519, 521, 94 L.Ed. 734 (1950). Thus, the discretion committed to the trial court is "subject to the essential demands of fairness."

Aldridge v. United States, 288 U.S. 308, 310, 51 S. Ct. 470, 471, 75 L.Ed. 1054 (1931); *United States v. Wooten*, 518 F.2d 943, 945 (3rd Cir.), *cert. denied*, 423 U.S. 895, 96 S. Ct. 196, 46 L.Ed.2d 128 (1975); *United States v. Napoleone*, 349 F.2d 350, 353 (3rd Cir. 1965). Here, the court has fairly exercised its serious duty enabling the parties to assist the court in empanelling a fair and impartial jury.

Petitioner did not exercise any challenges. She expressed satisfaction with the jury empanelled. Her arguments on this issue are without any support in either the law or in the record.

Petitioner also seeks to raise allegations that Moehringer's counsel engaged in misstatements during summation;

expressed personal opinion as to the credibility of the witnesses and veracity of the evidence; engaged in unfounded attacks on Petitioner's character that were inflammatory and prejudicial; that the Trial Court erred in failing to restrict defense counsel's closing argument; and that the Trial Court improperly restricted Petitioner's summation and submitted excessively technical special interrogatories to the jury.

The closing argument of Moehringer's counsel was based solely on characterizing the evidence of record and drawing reasonable inferences tc ultimate facts which were fully supported by the evidence in the record. Obviously, these inferences differ from Petitioner's inferences. But that is beside the point. The truth is

that the inferences drawn and commented on were also accepted and believed by six jurors and the District Court judge. They do not please Petitioner; but, that is the essence of the American jury system.

There is no error or bias demonstrated in that the Court did not restrict defense counsel's closing argument or that it ordered Petitioner not to interrupt with objections during the argument. The Trial Court advised the Petitioner that all objections could be made after summation, and, in fact, did so permit.

Numerous courts have held that the scope of closing argument is a matter committed to the trial court's discretion. *U.S. v. Wendt*, 698 F.2d 933 (8th Cir. 1982).

As noted by the Court:

> In closing arguments both defense attorneys and prosecution attorneys are allowed reasonably wide latitude; they may strike hard blows based upon testimony and its inferences. *U.S. v. Birges*, 723 F.2d 66, certiorari denied, 104 S.Ct. 1926 (9th Cir. 1984).

Also, of course, the statements made at final argument must be taken in the context of the entire trial. *U.S. v. Gordon*, 688 F.2d 42 (8th Cir. 1982).

Additionally, a trial court judge has the discretion to control the conduct of a trial. It is not error to preclude discussion of the jury instructions and the law in the summation of a litigant. In jury trials, this is the unique province of the trial judge. To contend otherwise is

absurd. No prejudical error was committed because the trial court interrupted Petitioner before she completed her explanation of what she believed the law to be.

Finally, Petitioner's assertion that the special interrogatories were excessively technical and abstract and confusing is patently ridiculous. These instructions were largely patterned after the New Jersey Model Jury Instructions and were extensively reviewed in over three hours of discussion and negotiations with the Court. Petitioner expressed satisfaction with the end result. They are neither technical nor confusing. The fact that the jury expressed difficulty in understanding the term "malicious" is of no significance. When they requested

clarification of the term and the judge re-read the jury charge, the matter was ultimately resolved and the jury continued to deliberate and subsequently reached a verdict. They did not request or need additional clarification. No prejudicial error occurred.

For the reasons expressed above, Petitioner has failed to demonstrate any bias on the part of the Court or any prejudice to a party to the litigation.

CONCLUSION

For the reasons expressed herein, Petitioner's application for a Writ of Certiorari should be denied.

Respectfully submitted,

PELLETTIERI, RABSTEIN & ALTMAN

BY: Arthur G. Lash
ARTHUR G. LASH

Dated: March 28, 1984

Supreme Court, U.S.
FILED
APR 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

No.88-1444

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

MICHAELA BERESTEANU GOLIN,

Petitioner,

v.

FMC CORPORATION and GEORGE E. MOEHRINGER.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

MICHAELA BERESTEANU GOLIN
626 Dutch Neck Road
East Windsor, NJ 08520
Tel. Nr.: (609) 448-6592
Petitioner, pro se

25pp

TABLE OF CONTENTS

Page

Table of contents. i

Table of authorities. iii

I. The respondent misconceives the Title VII pre-emption issue. . . .2

II. The respondent fails to meet petitioner's contention that the trial judge erroneously excluded significant corroborating and impeaching evidence. . .7

III. The respondent misconceives the duty of the trial judge to adequately instruct the jury in response to questions. 9

IV. The respondent misconceives the trial judge's discretion in conducting the prospective jurors' voir dire examination. . .10

V. The respondent misconceives the recusal issue. 13

VI. The respondent misconceives the trial judge's discretion in preventing the plaintiff from anticipating the court's instructions. 15

VII. The respondent misconceives the latitude allowed counsel in summation. 17

Conclusion. 20

TABLE OF AUTHORITIES

Cases: Page

Art Press, Ltd. v. Western Printing Machinery Co., 791 F.2d 616 (CA7 1986) 11

Darbin v. Nourse, 664 F.2d 1109 1112 (CA9 1981) 11

Giudice v. Drew Chemical Corp., 104 N.J. 465, 517 A.2d 448 (1986) 2, 6, 7

Griffin v. City of Omaha, 785 F.2d 620 (CA8 1986) 9

Henson v. City of Dundee, 682 F.2d 897 (CA11 1982) 9

Hetzel v. Jewel Companies, 457 F.2d 527 (CA7 1972) 16

Kiernan v. Van Schaik, 347 F.2d 775 (CA3 1965) 12

London Guarantee & Accident Co. v. Woefle, 83 F.2d 325 (CA8 1936) . . 16

Lucas v. Brown & Root, Inc., 736 F.2d 1202 (CA8 1984) . . . 2-4, 7

Marable v. H. Walker & Associates, 644 F.2d 390 (CA5 1981) 9

Mayberry v. Pennsylvania, 400 U.S. 455 (1970) 15

Mazza v. Winters, 95 N.J.Super. 71, 230 A.2d 139 (App.Div. 1967) . . . 18

New York Central R. R. Co. v. Johnson,
279 U.S. 310 (1929) 20

People v. Ford, 113 Ill.App.3d 659,
497 N.E.2d 564 (Ill.App. 1983) . . 18

People v. Huff, 173 Mich. 620,
139 N.W. 1033 (1913) 18

Pierce v. Ortho Pharmaceutical Corp.,
84 N.J. 58, 417 A.2d 505 (1980) . . . 5

Potashnick v. Port City Const. Co.,
609 F.2d 1101 (CA5), cert. denied,
449 U.S. 820 (1980) 14

Rucker v. Higher Educational Aids
Board, 669 F.2d 1179 (CA7 1982) . . 7

SCA Services, Inc. v. Morgan,
557 F.2d 110 (CA7 1977) 14

Sidorewicz v. Kostelny,
102 Ill.App.3d 851, 430 N.E.2d 377
(Ill.App. 1981) 16

United States v. Grooms,
454 F.2d 1308 (CA7), cert. denied,
409 U.S. 858 (1972) 18

United States v. Schartner,
426 F.2d 470 (CA3 1970) 18

United States v. Townsend,
478 F.2d 1072 (CA3 1973) 14

Velantzas v. Colgate-Palmolive Co.,
109 N.J. 89, 536 A.2d 237
(1988) 2, 4, 5, 7

Wilson v. City of Aliceville,
779 F.2d 631 (CA11 1986) 8

Statutes and Rules:	Page
28 U.S.C. § 138	14
28 U.S.C. § 144	13
28 U.S.C. § 455	15
F.R.Civ.P. 51	16

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

MICHAELA BERESTEANU GOLIN,

Petitioner,

v.

FMC CORPORATION and GEORGE E. MOEHRINGER.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

The respondent company's brief in opposition, filed on or about April 3, 1989, ["Opp.Br."], fails almost completely to meet the contentions made in the petition for a writ of certiorari. ["Petition"]. In addition, the company's brief at a number of places misstates the record and misconceives the applicable law.

In this reply brief, the peti-

tioner shall endeavor to correct some of the respondent's most glaring misrepresentations and misconceptions.

I. THE RESPONDENT MISCONCEIVES THE TITLE VII PRE-EMPTION ISSUE

The company's position rests on a number of basic errors which go to the heart of the case.

First, the company, one of the defendants below, urges that Title VII pre-empts petitioner's tort and contract claims despite the holdings of the Eighth Circuit and the New Jersey Supreme Court. (Opp.Br. 23-28). No authority is cited in support of this viewpoint. The respondent merely struggles to distinguish the case at bar from Lucas v. Brown & Root, Inc., 736 F.2d 1202 (CA8 1984); Velantzas v. Colgate-Palmolive Co., 109 N.J. 89, 536 A.2d 237 (1988); Giudice v. Drew Chemical Corp., 104 N.J. 465, 517 A.2d 448 (1986).

The company's argument is wholly without merit.

The defendant urges that Lucas v. Brown & Root is inapplicable on the ground that "[t]here, plaintiff's Title VII claim was dismissed as untimely. Plaintiff was permitted to pursue wrongful discharge claims." (Opp.Br. 24-25).

The respondent ignores the fact that Golin's Title VII claims also were dismissed by the trial judge, and therefore, like the plaintiff in Lucas, the petitioner should be permitted to bring her wrongful discharge tort and contract claims before the jury.

Without stating so directly, the respondent in fact implies that a cause of action in contract and tort for a discharge in violation of the clear mandate of public policy expressed in

Title VII cannot "co-exist" with the Title VII claim itself. To the contrary, in Lucas, the Eighth Circuit has emphasized that "Title VII does not preempt this state-law contract [and tort] claim." Lucas, 736 F.2d at 1206. The respondent does not allege that the common law claims pre-empt the Title VII claim. Therefore, its attempt to distinguish Lucas from the instant case is based on a fallacy.

Similarly, the respondent attempts to distinguish Velantzas v. Colgate-Palmolive on the ground that "Velantzas apparently never pleaded a statutory violation for discrimination and therefore, the issue whether separate claims for statutory violations and wrongful discharge could co-exist was never raised." (Opp.Br. 24).

The respondent fails to give page references in support of its contention that the plaintiff in Velantzas never pleaded a statutory violation for discrimination, and petitioner has been unable to find any. The New Jersey Supreme Court in Velantzas made it clear that an at-will employee discharged because of sex discrimination or in retaliation for pressing a sex discrimination claim may pursue a cause of action in contract or tort or both against the employer, because such discharge is in violation of the clear mandate of public policy expressed in Title VII and its state equivalent. See Velantzas, 109 N.J. 189, 536 A.2d 237, 238 & n.1. See also, e.g., Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505, 512 (1980). The defendant fails to explain, and this petitioner is unable to see, on

what grounds the New Jersey Supreme Court could possibly have precluded the plaintiff from seeking redress independently under Title VII and its state equivalent. The respondent's suggestion, without any supporting authority, that Title VII claims and common law wrongful discharge tort and contract claims cannot "co-exist" is based on a fallacy.

Finally, the defendant contends that Giudice v. Drew Chemical is inapplicable because Giudice "did not involve a discrimination issue." (Opp.Br. 24).

Contrary to the respondent's contention, Giudice involved a discrimination issue. The plaintiff in Giudice was discharged for complaining about a fellow employee's sexual harassment on the job. Such discharge constitutes discrimination in violation of Title VII. See, e.g., Rucker v. Higher Educational

Aids Board, 669 F.2d 1179, 1182 (CA7 1982).

In conclusion, Lucas, Velantzas and Giudice are applicable here. Petitioner was terminated in retaliation for complaining to defendant's upper management about her supervisor's sexual advances and for filing a sex discrimination charge with the FEP agencies. (Petition 26). The trial judge dismissed the Title VII retaliation claim. (Appendix to Petition ["App."] 63a-64a). Petitioner should be permitted to bring before the jury the breach of contract and the wrongful discharge tort claims which arise out of the same nucleus of facts.

II. THE RESPONDENT FAILS TO MEET PETITIONER'S CONTENTION THAT THE TRIAL JUDGE ERRONEOUSLY EXCLUDED SIGNIFICANT CORROBORATING AND IMPEACHING EVIDENCE

The respondent quotes the trial judge's holding that "the testimony of

the plaintiff was not worthy of belief" while "the testimony of the defendants' witnesses was credible." (Opp.Br. 20, 38). Yet the defendant's brief ignores petitioner's argument that the trial judge improperly excluded the evidence offered by the plaintiff to corroborate her testimony and to impeach the defendants' witnesses. (Petition 45).

In itself, the judge's failure to permit the impeachment of a witness is reversible error. See, e.g., Wilson v. City of Aliceville, 779 F.2d 631, 637 (CA11 1986).

In addition, where, as here, "the finder of fact proceeds upon a faulty theory to assess credibility, its finding based solely upon that assessment cannot stand." Henson v. City of Dundee, 682 F.2d 897, 912 (CA11 1982) (citation omitted). See also, e.g., Griffin v. City

of Omaha, 785 F.2d 620, 626 (CA8 1986); Marable v. H. Walker & Associates, 644 F.2d 390, 395-397 (CA5 1981).

III. THE RESPONDENT MISCONCEIVES THE DUTY OF THE TRIAL JUDGE TO ADEQUATELY INSTRUCT THE JURY IN RESPONSE TO QUESTIONS

The company contends that "[t]he fact that the jury expressed difficulty in understanding the term 'malicious' [interference] is of no significance. When they requested clarification of the term and the judge re-read the jury charge, the matter was ultimately resolved and the jury continued to deliberate and subsequently reached a verdict. They did not request or need additional clarification. No prejudicial error occurred." (Opp.Br. 56-57).

Contrary to the respondent's contention, the law is settled that "[w]here, as here, a jury makes known its

difficulty and requests further instructions on the law applicable to an important issue, the trial judge is required to give such supplemental instructions as may be necessary to guide it in the determination of the issue. A perfunctory re-reading of the very instructions which may have led to the difficulty does not fulfill the requirement." Walsh v. Miehle-Goss-Dexter, Inc., 378 F.2d 409, 415 (CA3 1967) (citations omitted) (emphasis added).

IV. THE RESPONDENT MISCONCEIVES THE TRIAL JUDGE'S DISCRETION IN CONDUCTING THE PROSPECTIVE JURORS' VOIR DIRE EXAMINATION

The company boldly asserts that "in the case at bar, the court has questioned the prospective jurors concerning their backgrounds as well as their attitudes about subjects germane to the issues at hand and whether they can be fair

and impartial. *** [Therefore], the court has fairly exercised its serious duty enabling the parties to assist the court in empanelling a fair and impartial jury." (Opp.Br. 50-52).

Contrary to the respondent's assertion, it is reversible error for the court to limit the voir dire to the so-called "stock questions" that were asked in this case (name, address, occupation, etc.), even though the court also inquired whether the jurors believed they could be impartial. See, e.g., Art Press, Ltd. v. Western Printing Machinery Co., 791 F.2d 616, 619 (CA7 1986); Darbin v. Nourse, 664 F.2d 1109, 1112 (CA9 1981).

Additionally, there was no objection here to plaintiff's proposed questions on voir dire. The trial judge rejected plaintiff's questions allegedly in order to expedite the jury selection

process and to "keep it moving as quickly as we can." (Partial Transcript of Jury Selection, p. 10). In itself, the rejection by a trial judge of proposed voir dire questions for such erroneous reasons is reversible error. Kiernan v. Van Schaik, 347 F.2d 775, 779 (CA3 1965).

Equally bold is the company's assertion that the "[petitioner] expressed satisfaction with the jury empanelled." (Opp.Br. 52). To the contrary, the record shows that petitioner expressed great concern with the inadequate selection process. Shortly after the jury selection, plaintiff filed an affirmation of bias and prejudice where she explained that "because the Honorable Garrett E. Brown, Jr. did not ask several questions that plaintiff considers necessary for fully exercising her challenges, plaintiff believes that the Court has not

fulfilled its duty to impanel an impartial jury." (Affirmation of Bias and Prejudice, District Court Pleading Number 84, filed on January 13, 1987, page 2, paragraph 4) (emphasis added).

V. THE RESPONDENT MISCONCEIVES THE RECUSAL ISSUE

The respondent contends that plaintiff's affirmation of bias and prejudice was not timely. (Opp.Br. 44). This contention is based on an obsolete provision of 28 U.S.C. § 144 that the affidavit "be filed not less that ten days before the beginning of the term *** at which the proceeding is to be heard." (Opp.Br. 44).

It is well settled that this provision no longer can be applied, because the terms of the court were abolished in 1963. See 28 U.S.C. § 138. What is now required is reasonable diligence.

Plaintiff's affirmation of bias and prejudice, filed prior to the presentation of any testimony in this action on the basis of statements allegedly made by the trial judge six days before, was timely. See, e.g., United States v. Townsend, 478 F.2d 1072, 1073 (CA3 1973); Potashnick v. Port City Const. Co., 609 F.2d 1101, 1115 (CA5), cert. denied, 449 U.S. 820 (1980); SCA Services, Inc. v. Morgan, 557 F.2d 110, 117 (CA7 1977).

The respondent contends that Golin's "allegations do not in any way rise to the level of proving any personal bias or prejudice on the part of the [trial judge]." (Opp.Br. 47). Yet the defendant's brief fails to address most of the petitioner's allegations. (Petition 40-45).

Furthermore, contrary to the defendant's contentions, the sufficiency

and timeliness of plaintiff's affirmation of bias and prejudice are not at issue. Under 28 U.S.C. § 455, a district judge has a continuing duty to recuse himself, where, as here, he appears unable to "maintain that calm detachment necessary for fair adjudication." Mayberry v. Pennsylvania, 400 U.S. 455, 465 (1970).

VI. THE RESPONDENT MISCONCEIVES THE TRIAL JUDGE'S DISCRETION IN PREVENTING THE PLAINTIFF FROM ANTICIPATING THE COURT'S INSTRUCTIONS

The defendant urges that "[i]t is not error to preclude discussion of the jury instructions and the law in the summation of a litigant." (Opp.Br. 55).

No authority is cited in support of this contention. Contrary to the respondent's contention, the requirement of Rule 51 of the Federal Rules of Civil Procedure that the judge inform the parties prior to final argument of his

action on the requested instructions has been adopted precisely to allow the parties to argue the instructions to the jury. See, e.g., Hetzel v. Jewel Companies, 457 F.2d 527, 535 (CA7 1972). See also London Guarantee & Accident Co. v. Woefle, 83 F.2d 325, 342 (CA8 1936).

Furthermore, where, as here, the plaintiff "was interrupted before she could complete her explanation as to what she believed the law to be, *** the court's ruling prejudiced plaintiff's case as she was not able to place the facts of the case within an appropriate framework from her perspective *** [and this] was error sufficient enough to warrant reversal." Sidorewicz v. Kostelny, 102 Ill.App.3d 851, 430 N.E.2d 377, 379 (Ill.App. 1981) (emphasis added).

VII. THE RESPONDENT MISCONCEIVES THE LATITUDE ALLOWED COUNSEL IN SUMMATION

The respondent boldly claims that the closing argument of the individual defendant's counsel "was based solely on characterizing the evidence of record and drawing reasonable inferences to ultimate facts which were fully supported by the evidence in the record." (Opp.Br. 53).

Contrary to the respondent's contention, there is not a scintilla of evidence in the record to support defense counsel's inflammatory remark in summation that plaintiff is, in essence, a malicious perjurer who manufactured the evidence. (11T22, 11T24, 11T45, 11T49). In itself, this unsupported comment constitutes reversible error. See, e.g., United States v. Grooms, 454 F.2d 1308, 1312 (CA7), cert. denied, 409 U.S. 858

(1972); United States v. Schartner, 426 F.2d 470, 478 (CA3 1970).

Similarly, nothing in the record supports defense counsel's remarks praising defendant Moehringer. (11T-47). To the contrary, Root testified that Moehringer was not a very good programmer (11T47); and Dvorak testified that she resigned because she didn't feel like putting up with Moehringer's harassment anymore (3T37). Vouching for one's witness constitutes reversible error. See, e.g., People v. Huff, 173 Mich. 620, 139 N.W. 1033, 1036 (1913); Mazza v. Winters, 95 N.J.Super. 71, 230 A.2d 139, 145 (App.Div. 1967); People v. Ford, 113 Ill.App.3d 659, 497 N.E.2d 564, 567 (Ill.App. 1983).

The respondent asserts that "[t]here is no error or bias demonstrated in that the [trial court] *** ordered

Petitioner not to interrupt with objections during the argument. The [trial judge] advised the Petitioner that all objections could be made after summation, and, in fact, did so permit." (Opp.Br. 54).

The respondent's contention is beside the point. The trial judge only permited the plaintiff to voice her objections after the jury had left the courtroom. (Petition 44).

As this Court has noted, "[t]he failure of the trial judge to sustain petitioner's objections or otherwise to make certain that the jury would disregard the appeal [to prejudice] could only have left them with the impression that they might properly be influenced by it in rendering their verdict, and thus its prejudicial effect was enhanced." New York Central R. R. Co. v. Johnson, 279

U.S. 310, 318 (1929).

CONCLUSION

The decision below raises important and recurring questions justifying the grant of certiorari.

In light of the respondent's inability to meet the issues presented in the petition without grossly distorting the applicable law and misstating the record, the need for this Court's review of the judgment below is indisputable. Indeed, petitioner respectfully suggests that summary reversal is now in order.

Respectfully submitted,

Michaela Beresteanu Golin
626 Dutch Neck Road
East Windsor, NJ 08520
Tel.Nr.: (609) 448-6592
Petitioner, pro se

April 10, 1989